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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2026

JOHN SALORIO, ROBERT COE and
JOHN D. McGARR, JR.,

Appellants,

v.

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Appellee.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
I—The Federal Questions are Substantial	8
A. There is an urgent need for the Court promptly to enforce the mandate of Austin v. New Hampshire, 420 U.S. 656 (1975), and to vindicate appellants' rights under the Privileges and Immunities Clause	8
B. The New Jersey Commuter Income Tax violates appellants' rights under the Equal Protection Clause	13
II—The Judgment Below Is "Final" Under Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	15
CONCLUSION	19
APPENDICES (separately bound):	
A—Opinion of the New Jersey Supreme Court	1a
B—Opinion of the New Jersey Superior Court, Chancery Division	39a
C—The New Jersey Emergency Transportation Tax (Commuter Income Tax), 54 N.J. Stat. Ann. §§ 8A-1—8A-57	62a
D—Notice of Appeal	137a

TABLE OF AUTHORITIES

PAGE

Cases:

American Export Lines, Inc. v. Alvez, 48 U.S.L.W. 4501 (1980) 18

Austin v. New Hampshire, 420 U.S. 656 (1975) .... *passim*

Brady v. Maryland, 373 U.S. 83 (1963) 19

Califano v. Goldfarb, 430 U.S. 199 (1977) 14

Carondelet Canal & Navigation Co. v. Louisiana, 233 U.S. 362 (1914) 19

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 3, 15-18

Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848) 19

Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) 18

Hicklin v. Orbeck, 437 U.S. 518 (1978) 12, 14, 15, 17

Local No. 438 Construction and General Laborers' Union v. Curry, 371 U.S. 542 (1963) 17

Mercantile National Bank of Langdeau, 371 U.S. 555 (1963) 17

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 17

Mills v. Alabama, 384 U.S. 214 (1966) 16, 17

National Socialist Party of American v. Village of Skokie, 432 U.S. 43 (1977) 17

Nebraska Press Association v. Stuart, 423 U.S. 1327 (1975) 17

New York v. Cathedral Academy, 434 U.S. 125 (1977) 16, 18

PAGE

New York v. New Jersey, 429 U.S. 810 (1976) 10

Pennsylvania v. New Jersey, 426 U.S. 660 (1976) 10

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 19

Shapiro v. Thompson, 394 U.S. 618 (1969) 15

Toomer v. Witsell, 334 U.S. 385 (1948) 12

Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870) 15

Articles:

Note, The Finality Rule for Supreme Court Review of State Court Orders, 91 Harv. L. Rev. 1004 (1978) 15, 18

Day, Taxing Interstate Commuters: A New Jersey Experiment Under the United States Constitution, 18 Rutgers L. Rev. 1 (1963) 6

Redish, The Pragmatic Approach to Appealability in the Federal Courts, 75 Colum. L. Rev. 89 (1975) .. 18

Constitutional Provisions, Statutes and Regulations:

28 U.S.C. § 1257 ..... 3, 19

U.S. Const., Art. IV, § 2, Cl. 1 3

U.S. Const., Amend. XIV, § 1 ..... 3, 13

54 N.J. Stat. Ann. §§ 8A-1—8A-57 (West) (Supp. 1979) 2, 4-6

N.Y. Tax Law § 602 (McKinney) (1978) 5

1 N.J. Tax Reporter (CCH) §§ 18-301, 305 6

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SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of New Jersey entered on March 26, 1980, and submit this statement to show that substantial federal questions are presented and that the Supreme Court has jurisdiction of the appeal.

Opinions Below

The opinion of the New Jersey Supreme Court is printed in Appendix A* hereto, p. 1a. It has not yet been reported. The opinion of the court of first instance (New Jersey Superior Court, Chancery Division) is printed in Appendix B hereto, p. 39a. It has not been reported.

Jurisdiction

Appellants filed this action in June 1977, in the Superior Court of New Jersey, Chancery Division, to declare unconstitutional the New Jersey Emergency Transportation Tax, also known as the Commuter Income Tax, 54 N.J. Stat. Ann. §§ 8A-1—8A-57 (West) (Supp. 1979), on the grounds that the tax is repugnant to the Privileges and Immunities and Equal Protection Clauses of the Constitution of the United States.

The New Jersey tax, appellants argued, is identical in structure, operation, and discriminatory effect with the commuter income tax struck down in *Austin* v. *New Hampshire,* 420 U.S. 656 (1975). Nevertheless, on October 24, 1978, the New Jersey Superior Court granted summary judgment to defendant and declared the tax constitutional.

On appeal to the New Jersey Supreme Court, that court, in a judgment entered on March 26, 1980, held that the Commuter Income Tax does not violate the Equal Protection Clause. As to appellants' claim under the Privileges and Immunities Clause, the New Jersey Supreme Court remanded for a further evidentiary hearing. The Notice of Appeal was filed in that court on June 19, 1980. Appendix D, p. 137a.

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* Appendices A, B, C, and D to this jurisdictional statement are separately bound.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Although the New Jersey Supreme Court in part remanded the case, the judgment below is "final" within the meaning of 28 U.S.C. § 1257, under *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), as discussed more fully *infra,* pp. 15-19.

Statutory and Constitutional Provisions Involved

New Jersey Emergency Transportation Tax (Commuter Income Tax), 54 *N.J. Stat. Ann.* §§8A-1-8A-57 (*West*) (*Supp.* 1979).

Reprinted in Appendix C to this Jurisdictional Statement, p. 62a.

U.S. Const., Art. IV, § 2, cl. 1

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

U.S. Const., Amend. XIV, § 1

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

1. Does a New Jersey statute which taxes income of New York residents earned in New Jersey at a rate of up to 15%, while at the same time imposing either no tax whatsoever, or a tax not exceeding 2½%, on the income of New Jersey residents earned in New Jersey, violate the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution?

2. Does a New Jersey statute which taxes income of New York residents earned in New Jersey at a rate of up to 15%, while at the same time imposing either no tax whatsoever, or a tax not exceeding 2½%, on the income of New Jersey residents earned in New Jersey, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

Statement of the Case

Appellants are three citizens and residents of the State of New York who work or who have worked in the State of New Jersey and who therefore have been subject to New Jersey's Commuter Income Tax.

Pursuant to the Commuter Income Tax, first enacted in 1961, New Jersey has taxed New York residents who derive income in or from the State of New Jersey at rates that range from 2% to 15% of taxable income. New Jersey residents, however, paid no income tax whatsoever on their income derived from New Jersey until July 1, 1976, and since that date they have paid income taxes of 2% to 2½%, under a separate tax called the New Jersey Gross Income Tax.*

The New Jersey Commuter Income Tax on New York residents is, and has been since its inception, identical in all significant respects with the New York State income tax. For example, the rate table for the Commuter Income Tax is a carbon copy of the rate table for New York's income tax as set out in the New York statute

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* New Yorkers working in New Jersey, who are subject to the Gross Income Tax as well as the Commuter Income Tax, are required to pay whichever tax results in the higher levy.

books.* Not only are the tax rates and structures of the two taxes identical, but each time New York has amended its income tax statute in any significant respect, New Jersey has shortly thereafter enacted an identical change.

By it terms, the Commuter Income Tax is imposed (a) upon residents of New Jersey on their income earned in another "critical area state" and (b) upon *all* income—including rents, capital gains, and so forth—derived from New Jersey by persons who are not residents of New Jersey but who reside in a "critical area state." 54 N.J. Stat. Ann. § 8A-2 (West) (Supp. 1979). A "critical area state" is one bordering on New Jersey as to which the State Highway Commissioner has certified that there exists a "critical transportation problem" relating to commutation between New Jersey and the bordering state. 54 N.J. Stat. Ann. § 8A-5 (West) (Supp. 1979).

The only "critical area" which has ever been certified is the New York-New Jersey border. Therefore, residents of New York who work in New Jersey and New Jersey residents who work in New York are theoretically subject to the Commuter Income Tax.

In practice, however, only New York residents are subject to the tax. The statute provides to New Jersey residents working in New York a credit against the Commuter Income Tax for income taxes which they pay to New York. 54 N.J. Stat. Ann. § 8A-16 (West) (Supp. 1979). Since New York's income tax is identical in rate with the Commuter Income Tax, New Jersey residents who work in New York pay income taxes to New York which

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* Compare 1978 N.J. Sess. Laws, Ch. 131, with New York Tax Law § 602 (McKinney, 1978) and 1978 N.Y. Sess. Laws, Ch. 70.

necessarily equal in amount the Commuter Income Tax; they therefore receive a full credit and pay no Commuter Income Tax to New Jersey.

No New Jersey resident has ever paid a penny under this tax. Indeed, New Jersey residents have been exempted from filing returns for the Commuter Income Tax. 54 N.J. Stat. Ann. § 8A-19(b) (West) (Supp. 1979); 1 N.J. Tax Reporter (CCH) § 18-301, 305.

Significant to the analysis required by *Austin* v. *New Hampshire,* 420 U.S. 656 (1975), New Jersey does not impose any tax which is payable by New Jersey citizens alone—all of New Jersey's other taxes are imposed upon residents and nonresidents alike.

The purported justification for the Commuter Income Tax is the burden that nonresident commuters allegedly place upon New Jersey's transportation facilities, and the proceeds of the tax assertedly are kept in a special fund for transportation projects. 54 N.J. Stat. Ann. § 8A-20-23 (West) (Supp. 1979). However, transfers from that fund may be and have been made regularly to the State's General Fund and to the Property Tax Relief Fund. *See* 54 N.J. Stat. Ann. § 8A-121 (West) (Supp. 1979).*

Moreover, Governor Meyner, in his original message to the New Jersey legislature, stated that the intent of the statute was to take advantage of tax credits granted by New York State's income tax scheme and divert tax revenues from New York. *See,* Day, *Taxing Interstate Commuters: A New Jersey Experiment Under The United States Constitution,* 18 Rutgers L. Rev. 1, 2 (1963).

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* Annually since 1976, the proceeds of the tax have been kept separate, pending the outcome of this challenge to the tax, and have been disbursed only at the end of each fiscal year.

And finally, imposition of the tax is not limited to New Yorkers who actually commute to New Jersey; rather, the tax is levied on *all* income derived by New Yorkers from New Jersey, including rents and capital gains, whether or not the New York resident ever sets foot in New Jersey.*

Appellants filed this action in June 1977 in the Superior Court of New Jersey, Chancery Division. Appellants moved for summary disposition of the case, arguing that the tax was plainly unconstitutional in light of *Austin*. Appellee submitted voluminous evidence regarding the alleged transportation burden imposed by New York State residents and the alleged benefits they receive from New Jersey, and cross-moved for a declaration that the tax was constitutional. On October 24, 1978, the Superior Court denied appellants' motion and granted appellee's cross-motion for summary judgment. Appendix B, p. 39a.

The Supreme Court of New Jersey thereafter granted appellants' motion to hear a direct appeal from the Superior Court judgment. On March 26, 1980, the New Jersey Supreme Court ruled that the tax was constitutional under the Equal Protection Clause. Appendix A, pp. 31a-35a.

However, with respect to appellants' claims under the Privileges and Immunities Clause, the court remanded for a further hearing, Appendix A, pp. 20a-27a, to determine (1) whether nonresidents constituted the "peculiar source" of the transportation problem advanced by New Jersey as the justification for the tax—even though it is undisputed that many more New Jerseyites than New

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* On the other hand, the tax is not levied on Connecticut residents, many of whom use the very same interstate transportation facilities as New Yorkers to commute to New Jersey.

Yorkers commute across the New York-New Jersey border daily; and (2) whether the discrimination practiced against nonresidents bears a "substantial relationship" to their contribution to that transportation problem—even though appellee himself testified that the rate of tax has never been based on any analysis of transportation problems but was geared *solely* to the New York income tax rates. (Deposition of Sidney Glaser, Jan. 12, 1978 at 59.)

I.

The Federal Questions are Substantial

A. There is an urgent need for the Court promptly to enforce the mandate of *Austin* v. *New Hampshire,* 420 U.S. 656 (1975), and to vindicate appellants' rights under the Privileges and Immunities Clause.

The decision below should be summarily reversed as being directly contrary to this Court's decision in *Austin* v. *New Hampshire,* 420 U.S. 656 (1975). If, after this Court has unequivocally decided an issue, a plaintiff must nevertheless spend years in a state-court system re-litigating that very same issue, then, it is fair to say, this Court's very authority is being undermined. Plainly and simply, the State of New Jersey is defying a straightforward decree of this Court.

The New Jersey Commuter Income Tax is indistinguishable from the discriminatory commuter tax which *Austin* held to violate the Privileges and Immunities Clause. Indeed, New Jersey submitted an *amicus* brief to the Court in *Austin* (on behalf of New Hampshire) which conceded that the two states' commuter income tax schemes were "similar." *See* Amicus Curiae Brief of the Attorney General of the State of New Jersey at 3, *Austin* v. *New Hampshire,* 420 U.S. 656 (1975). In fact, the two are identical:

—Each commuter income tax is a duplicate of the income tax imposed by the bordering state;

—Each was designed to, and has the effect of, taking advantage of tax credits granted by the bordering state in order to divert income tax revenues from that bordering state;

—Each is nominally imposed on residents and nonresidents, but, by means of credits or exemptions, in fact is imposed only on nonresidents;

—Each taxing state requires employers to withhold portions of the nonresidents' income for payment of the commuter income tax;

—Each commuter income tax "falls exclusively on the income of nonresidents; and it is not offset, even approximately, by other taxes imposed upon residents alone."* *Austin* v. *New Hampshire,* 420 U.S. at 665.

New Jersey has managed to stave off compliance with *Austin,* first, by engaging in dilatory motion practice in the understandably indulgent New Jersey state courts.**

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* In this and other respects, the New Jersey Commuter Income Tax is worse than the New Hampshire tax invalidated in *Austin.* New Hampshire residents did pay some taxes to which nonresidents were not subjected. *See Austin* v. *New Hampshire,* 420 U.S. at 659 n. 3. Moreover, the maximum rate paid by nonresidents was 4%. New Jersey residents until 1976 paid no taxes to which similarly situated New York residents were not also subjected, and since 1976 have paid a maximum of 2.5% under the New Jersey Gross Income Tax. The Commuter Income Tax imposed on New Yorkers has ranged as high as 15%.

** The tax involves some $40 million annually for New Jersey. The New Jersey trial judge candidly stated on a number of occasions that he was struggling for a way to uphold the tax, despite *Austin.* He said, for example: "[I]f I could find a way to end it or to avoid *Austin,* I surely would sustain this tax." (Transcript of Proceedings, Feb. 23, 1978 at 16.)

Thus, in proceedings to date, the State has 1) moved to transfer the case from the Chancery Division, even though appellants sought primarily declaratory and injunctive relief; 2) moved to dismiss the case for failure to exhaust administrative remedies—in the face of uniform authority holding that no exhaustion is necessary in a constitutional challenge to a statute; 3) moved to dismiss for failure to join New York State as a "real-party-in-interest," even though New Jersey previously had argued—and this Court had held—that New York had no standing;* and 4) moved to dismiss on the ground that plaintiffs lacked standing—on precisely the same argument raised and squarely rejected in *Austin* v. *New Hampshire,* 420 U.S. at 659-60 n. 4.

While the New Jersey courts ultimately dismissed each of these frivolous arguments (some of which were deemed "surprising" by the Superior Court Judge in light of the overwhelming contrary authority), these and other delaying actions by New Jersey have had the effect of dragging out the litigation, now three years old.

The remand ordered by the New Jersey Supreme Court would create much more delay.** But each day that the Commuter Income Tax remains in effect not only repre-

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**New York* v. *New Jersey,* 429 U.S. 810 (1976). New Jersey argued to this Court that "the Privileges and Immunities clause . . . only may be invoked by individual citizens and not by states." Brief of Attorney General of New Jersey in Opposition to Motion for Leave to File Original Action at 7, *Pennsylvania* v. *New Jersey,* 426 U.S. 660 (1976).

** The Attorney General of the State of New Jersey has already informed the lower court that he will move to stay all proceedings on remand pending the resolution of this appeal. He has also stated that if this Court declines to hear the case at this stage, he will seek many months from the date of that decision to prepare for a one or two day trial.

sents a violation of appellants' rights and a victory for New Jersey, but a continuing and conspicuous failure to give effect to an unambiguous decision of this Court. New Jersey continues to collect the unconstitutional tax, amounting to some $40 million annually, hopeful, perhaps, that statutes of limitation, and complex administrative processes, will render the ordering of refunds unlikely.*

The second means by which New Jersey has avoided compliance with *Austin* is by advancing a distinction between this case and *Austin,* and a justification for the tax, which is, with all due respect, a sham. The "transportation" justification alleged to distinguish this case from *Austin* must be meaningless as a matter of law. By definition, a nonresident who works in a neighboring state and thereby earns income can do so only by transporting himself there. This interstate commutation necessarily will impose some cost or "burden" upon the transportation facilities of the taxing state. *Austin* necessarily presented precisely the same problem, and therefore must be read to hold that the "transportation problem" created by the mere movement of residents of one state to work in a neighboring state cannot serve as a legitimate justification for a discriminatory tax. Otherwise, *Austin* would be a nullity.

The asserted "transportation" justification for the tax is also frivolous as a matter of fact. And thus no conceivable fact-finding on remand could justify the tax. It is undisputed that the number of New Jersey residents who commute to New York exceeds the number of New York residents who commute to New Jersey

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* New Jersey undoubtedly draws solace from the fact, of which we are advised, that five years after the *Austin* decision, Maine residents litigating in the New Hampshire courts have not yet succeeded in obtaining refunds.

by a factor of at least two or three to one (Appendix A, p. 22a). Hundreds of thousands of other interstate travelers use the same facilities on a daily basis. Based on these undisputed facts alone, appellee cannot rationally demonstrate that New Yorkers constitute the "peculiar source" of the alleged problem. *See Toomer* v. *Witsell,* 334 U.S. 385, 398 (1948); *Hicklin* v. *Orbeck,* 437 U.S. 518, 526-27. Even if appellee could somehow pass that threshold, the requisite "substantial relationship" between the burdens imposed by nonresidents and the discrimination practiced against them could not possibly be demonstrated. *See Toomer* v. *Witsell,* 334 U.S. at 398-99. Appellee conceded that the tax never even purported to be based on an analysis of any transportation burden created by New Yorkers. It was avowedly designed to be, and is, simply a device to divert New York State income tax revenues to New Jersey. Indeed, as originally enacted in 1961, the tax did not fall on New York residents at all; it was in 1962, when New York changed *its* system of credits, that New Jersey *retroactively* amended the New Jersey Commuter Income Tax to apply only to New Yorkers (Appendix A, pp. 11a, 13a). Further, as noted above, non-commuting New Yorkers, who impose no alleged "transportation burden," are subject to the tax. And, as the New Jersey Supreme Court acknowledged, to the extent the tax proceeds have been used for transportation projects, they have been used to fund intra-state rail and bus facilities utilized almost exclusively by New Jersey residents (Appendix A, p. 23a).

In short, the "transportation" distinction is a makeweight only. It cannot, on the *undisputed* facts, be shown to have any real "relationship" to this tax. More important, it is not a distinction at all, since precisely the same statutory structure, and a completely parallel set of facts (by the very definition of "commutation"), were present in *Austin.*

As was made clear in *Austin,* the interests at stake here are not mere economic interests. The decisions below have had, and will continue to have until overturned, a substantial harmful effect on the right of appellants, and thousands like them, to travel and to pursue their occupations in a neighboring state free from discriminatory treatment and on the structural integrity of the federal system. *See Austin* v. *New Hampshire,* 420 U.S. at 662.

If New Jersey's continued defiance of *Austin* is tolerated, other states will be encouraged to enact discriminatory commuter income taxes of the type struck down in *Austin,* and to seek to insulate those taxes from legal attack merely by dubbing them "transportation taxes." These may be followed by retaliatory taxes, which, as noted in *Austin,* would further disrupt interstate relations.

B. The New Jersey Commuter Income Tax violates appellants' rights under the Equal Protection Clause.

By singling out New York residents who derive income from New Jersey for discriminatory treatment, the New Jersey Commuter Income Tax also violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The tax cannot withstand scrutiny under the lenient standard of review applied by the New Jersey Supreme Court, *i.e.,* the rational basis test. *Austin* holds that the goal of diverting income tax revenues from a sister state is not a legitimate state interest which can justify discrimination. And the hostile and oppressive discrimination against the nonresidents who commute to New Jersey bears no rational relationship to the statute's asserted objective of alleviating interstate transportation burdens.

Surely a "rational basis" test cannot be satisfied by the remote possibility that, by sheerest accident, a statute actually designed to accomplish an impermissible purpose will happen to relate to a legitimate state interest. Surely no "rational basis" test is met when New Jersey imposes a tax not designed to relate to transportation problems, but rather geared only to diverting income tax revenues from New York. Surely the test is not met when the tax rate is based on the New York Income Tax rates and not on any analysis of the alleged transportation problems; when non-commuters who never use the transportation facilities are also subject to the tax; and when Connecticut residents who do use the same facilities are not taxed. *Cf. Califano* v. *Goldfarb,* 430 U.S. 199, 223 (1977) (Stevens, J., concurring) ("[S]omething more than accident is necessary to justify the disparate treatment . . .").

Moreover, the New Jersey Supreme Court erred in holding that the tax could be assessed under the "rational relation" standard, indeed with the additional latitude accorded states in the area of taxation. Appendix A, pp. 33a-34a. That determination sweeps aside the plainly fundamental rights at stake here.

The New Jersey Commuter Income Tax clearly affects, and burdens, specific interests that are undeniably "fundamental" in character. By taxing nonresidents more onerously than it taxes its own residents, New Jersey imposes a burden upon a citizen's right to travel interstate and to establish his abode in the state of his choice. A citizen who works, or wishes to work, in the State of New Jersey, but who desires to reside in the State of New York is simply penalized for his choice of state residence. Thus, not only is the right to travel implicated, but also the right to travel for purposes of employment. *Hicklin* v.

Orbeck, 437 U.S. 518 (1978); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Ward* v. *Maryland,* 79 U.S. (12 Wall.) 418, 430 (1870).

II.

The Judgment Below Is "Final" Under *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975).

This case falls within at least two of the categories of cases in which the Court has found finality even though further state-court proceedings have been ordered. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975). *See generally* Note, *The Finality Rule for Supreme Court Review of State Court Orders,* 91 Harv. L. Rev. 1004 (1978).

First, the case involves important federal rights which require immediate vindication, and a failure immediately to review this case would seriously erode federal policy. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 482-83. The New Jersey Supreme Court denied appellants' Equal Protection claim outright and set forth a standard of review under the Privileges and Immunities Clause to govern the "accounting" of benefits and burdens it ordered on remand—a standard which violates the Court's mandate in *Austin.* Hence the New Jersey Supreme Court has finally determined, albeit erroneously, both of the dispositive federal issues for purposes of subsequent state litigation.

Reversal of the state court on the federal issue would preclude any further litigation of this case, since appellants' position is that the tax is unconstitutional on its face in light of *Austin.* On the other hand, failure immediately to review the state court decision will seriously erode important federal policies by allowing New Jersey to continue to deny residents of New York their rights

under the Privileges and Immunities and Equal Protection Clauses, and to continue to flout the Court's clear mandate in *Austin*. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 482-83.

The very act of remanding the case for further state-court proceedings offends appellants' constitutional rights. Here, as in *Cox Broadcasting*, if the state "court erroneously upheld the statute, there should be no trial at all." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 485. *See also New York* v. *Cathedral Academy*, 434 U.S. 125, at 128 n.4 (1977).

Indeed, the proceedings on remand, like those in *Mills* v. *Alabama*, 384 U.S. 214, 217-18 (1966), will constitute a patent waste of time and energy. Under *Austin*, the New Jersey statute is unconstitutional on its face. Moreover, as noted above (*supra*, pp. 11-12) no rational fact-finding process could possibly show that New Yorkers are the "peculiar source" of the alleged transportation problem or that there is a "substantial relationship" between the tax and New Yorkers' alleged contribution to that problem.*

The very delay occasioned by the remand violates appellants' rights. The case was instituted three years ago.

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* That the New Jersey Supreme Court chose to remand for further evidence on these issues notwithstanding their apparent simplicity leaves appellants less than assured that they will prevail on remand, particularly since the same issues arose and should have been dispositive in the prior proceedings. Moreover, the New Jersey court apparently has injected an additional factor into the "accounting" to take place below, *i.e.*, the amount of taxes such as the property tax which are paid by residents and nonresidents alike. Appendix A, pp. 24a-25a. In *Austin* v. *New Hampshire*, 420 U.S. at 659 n.3, this Court specifically stated that such taxes are irrelevant to the Privileges and Immunities inquiry.

If the decision below is not immediately reversed, it may well take several additional years to get the dispositive constitutional questions finally determined. *See Mills* v. *Alabama,* 384 U.S. at 218 n.4. Subjecting appellants to lengthy further proceedings in the state courts will result in irreparable injury to fundamental rights.

That the rights here involved are fundamental was established in *Austin* v. *New Hampshire,* 420 U.S. at 662:

> "The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism."

Certainly these rights, together with the right to travel —a right partly grounded in the First Amendment— and the right to practice one's occupation in a neighboring state free from discriminatory restrictions, which also are implicated here, are as precious as the rights involved in other cases where the Court has found jurisdiction because delay in vindication of the right is itself intolerable. See *Hicklin* v. *Orbeck,* 437 U.S. at 524-26 (1978). *See also Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 485 n.12; *National Socialist Party of America* v. *Village of Skokie,* 432 U.S. 43, 44 (1977); *Nebraska Press Association* v. *Stuart,* 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers) (". . . [E]ach passing day may constitute a separate and cognizable infringement. . . . In this sense delay itself is a final decision"); *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 247 n.6 (1974); *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 558 (1963); *Local No. 438 Construction and General Laborers' Union* v. *Curry,* 371 U.S. 542, 548-52 (1963).

Second, and alternatively, the judgment below is "final" because this case may be viewed as one in which the dispositive federal issue will survive and require decision by this Court regardless of the outcome of future state-court proceedings. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 480. That determination may be based on the pragmatic circumstances of the case. *See American Export Lines* v. *Alvez,* 48 U.S.L.W. 4501, 4502-03 (1980). *See also* Note, *The Finality Rule for Supreme Court Review of State Court Orders,* 91 Harv. L. Rev. 1004, 1019-20, n. 89 (1978). *Cf. Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 152-54 (1964); Redish, *The Pragmatic Approach to Appealability in the Federal Courts,* 75 Colum. L. Rev. 89 (1975) (appeals under 28 U.S.C. § 1291).

Appellants' argument that the tax is invalid on its face in light of *Austin* has been finally rejected by the New Jersey Supreme Court, but it will undoubtedly be presented to this Court later if review is not obtained now, no matter what the outcome of the "accounting" ordered by the New Jersey Court. If appellants do not prevail on remand, they will return to this Court on appeal or with a writ of certiorari. On the other hand, if appellants do prevail on remand, they will still raise the issue in response to appellee's inevitable petition for certiorari in this case which involves some $40 million of tax revenues yearly.

Thus, "[n]othing that could happen in the course of the accounting, short of settlement of the case, would foreclose or make unnecessary decision on the federal question." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 480. In this sense, the case resembles other cases the Court has reviewed when the proceedings contemplated on remand will not eliminate the federal issue. *See, e.g., American Export Lines* v. *Alvez,* 48 U.S.L.W. 4501 (1980); *New York* v. *Cathedral Academy,* 434 U.S. at 128 n.4

(1977); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945); *Carondelet Canal & Navigation Co.* v. *Louisiana*, 233 U.S. 362 (1914); *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1848).

In short, the judgment below is "final" within the meaning of 28 U.S.C. § 1257.

For the reasons stated, the judgment below also meets the specific requisite of 28 U.S.C. § 1257(2), conferring appellate jurisdiction. With respect to appellants' claim under the Equal Protection Clause, the decision of the New Jersey Supreme Court is, by its express terms, "in favor of [the] validity" of the New Jersey Commuter Income Tax. 28 U.S.C. § 1257(2). As to appellants' Privileges and Immunities Clause claim, the New Jersey court's decision is, in practical effect, a decision "in favor of its validity"; the tax is still being imposed.

(Should this Court not agree that the judgment appealed from meets the requirements of 28 U.S.C. § 1257 (2), we respectfully request that the Court treat this Jurisdictional Statement as a petition for certiorari under 28 U.S.C. § 1257(3)).

CONCLUSION

This case, we submit, presents a classic occasion for summary reversal: the plain disregard of a prior decision of this Court. The Court should summarily reverse the decision below, with instructions to declare the New Jersey Commuter Income Tax unconstitutional in light of *Austin v. New Hampshire*.

Respectfully submitted,

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June 23, 1980

Supreme Court, U. S.
FILED
JUN 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2026

JOHN SALORIO, ROBERT COE and
JOHN D. McGARR, JR.,

Appellants,

v.

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Appellee.

On Appeal from the Supreme Court of New Jersey

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INDEX

PAGE

APPENDIX:

A—Opinion of the Supreme Court of New Jersey, dated March 26, 1980 (as amended on May 16, 1980) 1a

B—Opinion of the Superior Court of New Jersey, Chancery Division, dated October 24, 1978 (as amended October 31, 1978 and November 8, 1978) 39a

C—New Jersey Emergency Transportation Tax (Commuter Income Tax), 54 N.J. Stat. Ann. §§ 8A-1 to 8A-57 (West) (Supp. 1979) 62a

D—Notice of Appeal to the Supreme Court of the United States 137a

APPENDIX A

Opinion of the Supreme Court of New Jersey, dated March 26, 1980 (as amended on May 16, 1980)

SUPREME COURT OF NEW JERSEY

A-60 SEPTEMBER TERM 1979

JOHN SALORIO, ROBERT COE and JOHN D. McGARR, JR.,

Plaintiffs-Appellants,

v.

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Defendant-Respondent.

Argued November 14, 1979—Decided March 26, 1980

On certification to the Superior Court, Chancery Division.

Adrian M. Foley, Jr., and *Max Gitter* a member of the New York Bar, argued the cause for the appellants (*Connell, Foley & Geiser*, attorneys; *Max Gitter* and *Mark C. Morril* members of the New York Bar and *Adrian M. Foley, Jr.*, and *Kevin J. Coakley*, of counsel and on the briefs).

Stephen Skillman, Assistant Attorney General argued the cause for the respondent (*John J. Degnan*, At-

torney General of New Jersey, attorney; *Stephen Skillman,* Assistant Attorney General, *Herbert Glickman* and *Joseph C. Small,* Deputy Attorneys General, on the brief).

The opinion of the Court was delivered by
PASHMAN, J.

I

This case presents for review the constitutionality of the Emergency Transportation (ETT) Act, N.J.S.A. 54: 8A-1 *et seq.*

Plaintiffs,[1] three New York residents who commute or have commuted from their homes in New York to work in New Jersey, claim that since the ETT is paid solely by New York residents, it impermissibly discriminates against them in violation of the Privileges and Immunities and Equal Protection Clauses of the Federal Constitution. *U. S. Const.,* Art. IV, §2, cl. 1; Amend XIV, §1. The State argues that imposition of the tax is justified by the existence of a "transportation emergency."

Plaintiffs filed suit in the Superior Court, Chancery Division, on June 8, 1977, seeking declaratory and injunctive relief from imposition of the tax. They also demanded damages in the amount of all monies paid to New Jersey pursuant to the ETT.[2]

The taxpayers and the State filed cross motions for summary judgment. On plaintiffs' motion, the court agreed

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[1] John Salorio, John D. McGarr, Jr., and Robert Coe.

[2] Since the issue was neither briefed nor argued, we do not address the extent of the State's liability, if any, for money damages.

to hear the matter as a summary proceeding without oral testimony pursuant to R. 4:67. Taking issue with plaintiffs' contention that the tax statute was facially unconstitutional under *Austin* v. *New Hampshire,* 420 U.S. 656, 43 L.Ed2d 530 (1975), the State requested an opportunity to develop and introduce evidence that a "transportation emergency" justified the disparate treatment of non-residents. The parties took depositions of the plaintiffs and various State officials. The State also submitted documentary material regarding a 1962 taxation accord between New York and New Jersey (hereinafter the Accord).

In a letter opinion, the trial court declared the tax constitutional. According to the court, the sole issue presented by the plaintiffs under the Privileges and Immunities Clause was "whether or not the *Austin* case is dispositive of [the validity of] the legislation." Finding that a transportation crisis did in fact exist, and comparing the total tax liabilities of New Jersey residents to that imposed by New Jersey on commuters from New York, the court concluded that the criterion of "substantial equality" enunciated in *Austin* was satisfied. See 420 U.S. at 665, 43 L.Ed. 2d at 537. The court further held that even if there were no distinctions between the present case and *Austin* based on the states' justifications for their respective taxes, the 1962 Accord was sufficient to validate New Jersey's taxation scheme.

Addressing plaintiffs' claim under the Equal Protection Clause, the court noted that in economic matters a statute need only bear some rational relation to a legitimate governmental objective. In the area of tax policy, the Legislature enjoys particularly broad discretion. Having found a proper governmental purpose, the court sustained the tax. The court did not determine whether the Act was unconstitutionally applied by reason of misappropriation of ETT

receipts. Noting that the Act itself "contains the internal safeguards" to insure that tax monies would be spent exclusively to alleviate the State's "transportation emergency," the court remanded plaintiffs to the remedies provided by the statutory scheme. It accordingly entered judgment in favor of the State.

Plaintiffs appealed from the judgment of the trial court. While the appeal was pending unheard in the Appellate Division, plaintiffs filed a motion for direct certification pursuant to R. 2:12-2. This Court granted plaintiffs' motion. 81 N.J. 269 (1979). We now vacate the trial court judgment and remand the matter for proceedings consistent with this opinion.

II

Standing

An initial question arises as to plaintiffs' standing to bring this action. The record discloses that each of the plaintiffs either has paid or continues to pay emergency transportation taxes to New Jersey.[3] However, since New York grants its residents a credit for income taxes paid to

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[3] Plaintiff John Salorio filed non-resident returns during the years 1972 through 1976 and paid from $1,493 to $2,467 per year in emergency transportation taxes. Plaintiff Robert Coe currently has emergency transportation withheld from his income. Plaintiff John D. McGarr, Jr. filed non-resident returns for 1975, 1976 and 1977, paying $1,903, $2,734 and $4,096 respectively, in emergency transportation taxes. A portion of emergency transportation taxes paid by Salorio and McGarr on income earned after the effective date of the Gross Income Tax Act, L. 1976, c. 66, N.J.S.A. 54A:1-1 *et seq.*, (effective August 17, 1976) was allocated as receipts under the latter tax. See N.J.S.A. 54:8A-121; *infra* at (slip op. at 18).

other states, any reduction in tax liability to New Jersey will result in an equal increase in tax liability to New York. See *infra* at —— (slip op. at 14-15). Thus plaintiffs would not gain financially from a judgment in their favor. Emphasizing this apparent lack of economic harm and the fact that the State of New York is financing the present litigation, the State argues that plaintiffs do not have sufficient interest in the case and that New York is the "real party in interest."

Despite the fact that plaintiffs' total tax obligation may remain unchanged, we conclude that they have standing to challenge the constitutionality of the ETT. It is important to recognize that New Jersey State courts are not bound by the "case or controversy" requirement governing federal courts, *U.S. Const.*, Art. III, §2. See *Crescent Park Tenants Ass'n* v. *Realty Eq. Corp. of N.Y.*, 58 N.J. 98, 107-108 (1971). Our State Constitution contains no analogous provision limiting the subject-matter jurisdiction of the Superior Court. See *N.J. Const.* (1947), Art. VI, §3, par. 2. This Court remains free to fashion its own law of standing consistent with notions of substantial justice and sound judical administration. We therefore find it necessary to consider whether federal standing requirements have been met.[4]

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[4] We also recognize that on review, the United States Supreme Court " 'must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court..' " *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 525, 3 L.Ed.2d 480, 483-484 (1959) (quoting *First Nat'l Bank* v. *Anderson*, 269 U.S. 341, 346 (1926) and *Staub* v. *Baxley*, 355 U.S. 313, 318 (1958)).

Appendix A

We have consistently held that in cases of great public interest, any "slight additional private interest" will be sufficient to afford standing. *New Jersey State Chamber of Commerce* v. *New Jersey Election Law Enforcement Comm'n,* —— N.J. —— (1980) (slip op. at 16-17); *Home Builders League of South Jersey, Inc.* v. *Tp. of Berlin,* 81 N.J. 127, 132 (1979); *Terwilliger* v. *Graceland Memorial Park Ass'n,* 35 N.J. 259, 268 (1961), aff'g 59 N.J. Super. 205, 215 (C. Div. 1960); *Elizabeth Federal Savings & Loan Ass'n* v. *Howell,* 24 N.J. 488, 499 (1957); *Al Walker Inc.* v. *Bor. of Stanhope,* 23 N.J. 657, 660-666 (1957); *Driscoll* v. *Burlington-Bristol Bridge Co.,* 8 N.J. 433, 476 (1952), *cert.* den., 344 U.S. 838, 97 L.Ed. 652 (1952); *cf. Hudson-Bergen County Retail Liquor Stores Ass'n* v. *Bd. of Comm'rs of Hoboken,* 135 N.J.L. 502 (E & A 1947). A sufficient private interest exists in this case. If successful, plaintiffs would enjoy the benefit derived from the use of any funds recovered from the State of New Jersey prior to the time such monies may have to be remitted to New York. As New York residents, they would also share in the possible beneficial effect that a resulting increase in tax revenue to New York might have on future New York tax rates.[5]

As the trial court noted, the United States Supreme Court has rejected the State's theory that New York and not the plaintiffs is the "real party in interest." In *Pennsylvania* v. *New Jersey,* 426 U.S. 660, 49 L.Ed.2d 124 (1976), Pennsylvania alleged that this State's Transporta-

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[5] These interests were advanced by plaintiff Robert Coe at his deposition and not challenged by the State. Coe also claimed that he would "not have to file so many forms," but on cross-examination by the State admitted that he would still be required to file a New Jersey gross income tax return.

tion Benefits Tax, N.J.S.A. 54:8A-58 *et seq.*,[6] was unconstitutional under the Privileges and Immunities Clause of Article IV and the Equal Protection Clause of the Fourteenth Amendment.[7] Finding no justiciable controversy, the United States Supreme Court denied Pennsylvania's motion for leave to file an original complaint. The Court held that the only direct injury to the plaintiff states resulted from decisions by their legislatures to extend tax credit for income taxes paid by their residents to the defendant states. Without resolving Pennsylvania's claims

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[6] The Transportation Benefits Tax operated in a manner similar to the ETT, covering only Pennsylvania residents deriving income from sources within New Jersey. The term "critical area state" was also used in this legislation, but the statute's operation was predicated upon the existence of a "*severe* transportation problem" rather than a "*critical* transportation problem." Compare N.J.S.A. 54:8A-61(a) with *id.* at 54:8A-5(a) (emphasis supplied). Subsequent legislation permitted reciprocal agreements with critical area states whereby individuals could be relieved of liability under the Transportation Benefits Tax or the ETT. L. 1976, c. 126, §1, N.J.S.A. 54A:8A-122. Such an agreement was concluded by New Jersey and Pennsylvania on December 20, 1976 and amended by the states on December 31, 1977. As a consequence, the Transportation Benefits Tax is no longer imposed on Pennsylvania residents earning income in New Jersey, and New Jersey residents earning income in Pennsylvania are no longer liable for Pennsylvania state income taxes.

[7] In a separate case decided by the Court in *Pennsylvania* v. *New Jersey*, Maine, Massachusetts and Vermont were denied leave to file original complaints against New Hampshire for an accounting of funds diverted from their treasuries as a result of credit given their residents for taxes paid under New Hampshire's unconstitutional commuter income tax. These states based their claims on the violation of the Privileges and Immunities Clause found by the Court in *Austin. Pennsylvania* v. *New Jersey*, 426 U.S. at 661-663, 49 L.Ed.2d at 127-128.

that the Transportation Benefits Tax Act violated the Privileges and Immunities and Equal Protection Clauses, the Court responded:

> The short answer to these contentions is that both Clauses protect people, not States.
>
> [426 U.S. at 665, 49 L.Ed.2d at 129]

New York similarly attempted to challenge the ETT in an original action in the United States Supreme Court, *New York* v. *New Jersey,* 429 U.S. 810, 59 L.Ed.2d at 70 (1976), but the Court denied its motion for leave to file an original complaint, citing *Pennsylvania* v. *New Jersey, supra.* New York, therefore, cannot be the real party in interest in this case; its role in financing the litigation is irrelevant to plaintiffs' standing to bring suit.

We conclude that as a matter of New Jersey law, the interests asserted by plaintiffs are personal to them and justiciable in the present suit.[8]

---

[8] New Jersey argues that since the issues involve the relationships between New Jersey's and New York's tax laws and since the 1962 agreement constitutes an element of the State's defense, complete adjudication is impeded by New York's absence. This argument is misconceived. This Court may construe the agreement and determine its relevance without the presence of New York as a party. Joinder of New York is not required. See R. 4:28-1. In view of our holding regarding the constitutional significance of the Accord, see *infra* at (slip op. at 32-37), we need not consider whether it would have been desirable to invite New York to participate as a litigant.

Appendix A

III

The Statutory Scheme

The enactment of the ETT in 1961, L. 1961, c. 32, was preceded by extensive studies and hearings on the transportation problems facing the New Jersey-New York metropolitan area. See *Report of the Project Director of the Metropolitan Rapid Transit Commission* (1957) (hereafter *Metropolitan Transit Commission Survey*); *Public Hearings on Assembly Bills No. 16 & 115 and Senate Bill No. 50 before New Jersey Legislature Assembly Committee on Federal & Interstate Relations and Assembly Committee on Highways, Transportation & Public Utilities* (November 24 & December 3, 1958); *Joint Report of the New Jersey Legislature Assembly Committee on Highway, Transportation & Public Utilities and the Committee on Federal and Interstate Relations on A-16, A-115 and S-50* (1958); *Report on Rapid Transit for the New York-New Jersey Metropolitan Area* (1958) (hereafter *Metropolitan Rapid Transit Report*); N.J. State Highway Dep't, Div. of Railroad Transportation, *A Proposal Towards Solving New Jersey's Transportation Problem* (1959); N.J. Governor, 1954 (Meyner), *Memorandum—Proposed Commuter Benefit Tax* (May 2, 1960) (hereafter *Governor's Memorandum*); *Public Hearing before New Jersey Legislature Assembly Appropriations Committee on Assembly Bill No. 65, Emergency Transportation Tax Act* (May 20, 1960) (hereafter *Hearing on Assembly Bill No. 65*). These inquiries focused mainly on the impact of peak-hour transportation demands generated by interstate commuters.[9] See, *e.g., Governor's Memorandum, supra* at 1; *Hearing on*

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[9] The changing pattern of commutation—away from rail service towards the use of private automobiles—was another persistent theme in these studies and reports.

Assembly Bill No. 65, supra at 1, 8; *Metropolitan Rapid Transit Report, supra* at 14. Efforts to ease New Jersey's burden culminated in the passage of Chapter 32 of the Laws of 1961.[10] The statute authorized a tax on the income derived by New Jersey residents from sources in another "critical area state" and on the income of residents of another "critical area state" derived from sources within this State. The statute defined "critical area state" to mean

> this State and such other State bordering thereon within which there exists part of an area, another part of which is in this State, and within which area there is, as of January 1 of any year, a critical transportation problem in respect to the transportation of persons and property interstate.
>
> [L. 1961, c. 32, §5(a), N.J.S.A. 54:8A-5(a)]

This authority would be invoked during any year in which the State Highway Commissioner certified the existence of a "critical transportation problem." L. 1961, c. 32, §5(c), N.J.S.A. 54:8A-5(c). Such a certification would entail a finding that

> there is such number of daily commuters between [the] States as to create a severe peak-load demand

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[10] Other proposed solutions—such as a bi-state rapid transit loop and the use of surplus New Jersey Turnpike collections to subsidize railroad passenger service—failed to muster sufficient support. See *Statement of Dwight R. G. Palmer, Commissioner, N.J. State Highway Department, before the New Jersey Senate Committee Investigating the Financial Structure and Operations of the Port of New York Authority* at 4 (Jan. 26, 1961); *Hearing on Assembly Bill No. 65, supra* at 7 (Comments of Stephen Wiley, Counsel to the Governor); *Metropolitan Transit Commission Report, supra* at 57-66 (Appendix B); *Metropolitan Rapid Transit Survey, supra* at 23-34.

> requiring facilities and services, by any means or mode of transportation far in excess of those needed for normal travel outside of usual commuter hours * * *.
>
> [L. 1961, c. 32, §5(b), N.J.S.A. 54:8A-5(b)]

According to a legislative presumption,

> [W]henever the aggregate number of [interstate commuters] * * * exceeds 100,000, that fact reasonably indicates that a critical transportation problem exists.
>
> [*Id.*]

Pursuant to section 5(c) of the act, N.J.S.A. 54:8A-5(c), the State Highway Commissioner certified to the State Treasurer on June 27, 1961, that a critical transportation problem existed in an area partly in New Jersey and partly in New York and that the states of New York and New Jersey were therefore "critical area states" within the meaning of section 5. *1961 Certification of the New Jersey State Highway Commissioner* (hereafter "1961 Certification") at 21.

As enacted the ETT contained a credit provision which would have released New York residents from imposition of the tax by virtue of then existing New York law. The credit allowed out-of-state residents to deduct payments under their home state's income tax from their ETT liability if their home state granted a reciprocal privilege to New Jersey residents. See L. 1961, c. 32, §16, N.J.S.A. 54:8A-16(A). At the time the ETT act became law, New York permitted such a reciprocal tax credit. See 1960 *N.Y.Sess.Laws,* Ch. 563, *N.Y. Tax Law* §640 (repealed). Because ETT and New York Personal

Income Tax rates were identical, see *infra* at (slip op. at 16), the operation of both states' credit provisions would have allowed commuters from either state to avoid paying any income tax to the states where they worked. Thus when originally enacted, the ETT fell exclusively on New Jersey residents earning income in New York, the number of which was far greater than the number of New York residents earning income in New Jersey. See *1961 Certification, supra,* at 7. It is apparent from the hearings held before passage that New York's reciprocal credit had been taken into account in devising the emergency transportation tax. Indeed, the tax was described as having been anticipated by New York since its enactment in 1919 of an income tax with a reciprocal credit provision. See 1919 *N.Y.Sess.Laws,* Ch. 627, §363. It was characterized as simply diverting New Jersey residents' money back to New Jersey.[11]

New York's response to this potential loss of revenue was a prompt repeal of the credit it granted to nonresidents taxed by their home states, and the amendment of its tax law to allow credit only to its own residents paying taxes to other jurisdictions. 1962 *N.Y. Sess. Laws,* Ch. 2, repealing *N.Y. Tax Law* §640 and amending §620.[12] This change in New York law pre-

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[11] See *Hearing on Assembly Bill No. 65, supra* at 11 (Remarks of Stephen Wiley, Counsel to the Governor: "We are not getting something which doesn't belong to us. We are not getting $40 million for nothing. We are simply 41 years late getting what we should have gotten all the way along.").

[12] Such a response by New York was not completely unexpected. Serious concern was expressed during deliberations on the ETT

(Footnote continued on following page)

vented New Jersey commuters from deducting ETT payments from their New York income tax liability and had the effect of subjecting New York residents to the ETT at the time, however, no credit provision existed which would have released New Jersey residents from their ETT liability. See L. 1961, c. 32, §16; L. 1961, c. 129, §9. As a result, New Jersey residents were liable for both New York Personal Income Tax and the ETT on income earned in New York, while New York residents were liable for only the ETT on income derived from sources in New Jersey.

Subsequent negotiations between officials of the two states resulted in a more balanced arrangement for taxing income earned in one state by residents of the other. On May 6, 1962, the Governors of New York and New Jersey issued a statement embodying the terms of this agreement. New York would allow its residents a credit against New York State personal income taxes for payments to New Jersey under the ETT, pursuant to the legislation enacted earlier in 1962. See 1962 *N.Y. Sess. Laws Ch.* 2, *N.Y. Tax Law* §620. The Governor of New Jersey would propose legislation granting credit to New Jersey residents against their ETT liability for income taxes paid to New York. Such legislation was passed on June 5, 1962. L. 1962, c. 70, §4, N.J.S.A. 54:8A-16(B). Both states' credits were given retroactive effect be-

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(Footnote continued from preceding page)

Act that its passage would prompt New York to effect double taxation of New Jersey commuters. However, it was thought "practically impossible or illegal" for New York to deny New Jersey residents an income tax credit. *Governor's Memorandum, supra* at 3-4. See *Public Hearing on Assembly Bill No. 65, supra* at 11-12 (Comments of Stephen Wiley, Counsel to the Governor), 25 (Comments of Mrs. Kenneth B. Smith, Vice-President of League of Women Voters of New Jersey).

ginning January 1, 1961. L. 1962, c. 70, §13; 1962 *N.Y. Sess. Laws,* Ch. 2, §7.

The 1962 amendment to the ETT act, L. 1962, c. 70, provided that the Division of Taxation, Department of the Treasury, could be regulation relieve New Jersey residents of the obligation to file an ETT return "[i]f it shall appear to the satisfaction of the [D]ivision, based upon an opinion of the Attorney General," that the credit given for taxes paid to another critical area state would be "substantially sufficient to offset" the liability under the ETT. L. 1962, c. 70, §6, N.J.S.A. 54:8A-19(b). Later that year the Attorney General issued Formal Opinion No. 1 which expressed the view required by the amendment. *Atty. Gen. Op. No. 1* (1962). The Division of Taxation accordingly issued a regulation excusing New Jersey residents from filing ETT returns. *N.J. Tax Reg.* No. 1963-1, N.J.A.C. 18:10-11.3.

The fact that New York income taxes offset ETT assessments was not fortuitous. As originally enacted and subsequently amended, rates under ETT have been set to equal those of the New York personal income tax. Compare L. 1961, c. 32 with 1960 *N.Y. Sess. Laws Ch.* 563; L. 1972, c. 12, N.J.S.A. 54:8A-6.3 (tax surcharge) with 1972 *N.Y. Sess. Laws Ch.* 1, *N.Y. Tax Law* §601-B (tax surcharge); L. 1978, c. 131, N.J.S.A. 54:8A-6, with 1977 *N.Y. Sess. Laws Ch.* 70 & 1978 *N.Y. Sess. Laws Ch.* 70, *N.Y. Tax Law* §602. Consequently no New Jersey resident has ever paid any emergency transportation taxes, although they have paid a monetary equivalent to New York under the New York Personal Income Tax. Conversely, since the New York-New Jersey metropolitan area is the only "critical area" ever certified under the act, only New York residents have in fact paid the emergency transportation tax. They in turn have received credit

exempting them from payment to New York of the New York Personal Income Tax. See, *e.g.*, 1961 *Certification, supra,* at 20-21; 1970 *Certification of the Commissioner of Transportation* at 20-21; 1977 *Certification of the Commissioner of Transportation* at 11-12.

The tax is imposed on income "derived from sources within" New Jersey, defined to include

> such income and gain from all property owned[13] and from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, and from all business, trade, profession or occupation carried on, in [New Jersey].
>
> [N.J.S.A. 54:8A-4 (footnote added)]

Under N.J.S.A. 54:8A-20, all ETT receipts are allocated to a special "Transportation Fund." They may be used only for the financing of projects and programs designed to alleviate transportation problems between New Jersey and the other critical area state—New York. Disbursements are to be "screened" to insure proper use of ETT money. N.J.S.A. 54:8A-20(b). Misapplication of the Transportation Fund automatically entitles each contributor to a refund equalling his pro rata share of the monies illegally disbursed. N.J.S.A. 54:8A-22.

After July 1, 1976, the scheme of taxation in New Jersey was profoundly altered. With the passage of the Gross Income Tax Act, N.J.S.A. 54A:1-1 *et seq.*, New Jersey residents and all non-residents earning income in New

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[13] By this provision, non-commuting New Yorkers are also subject to this tax. Plaintiffs have not alleged that they pay ETT on income other than wages or salaries earned in New Jersey.

Jersey[14] became subject to a levy of 2% on taxable income up to $20,000 and 2.5% on the excess income over $20,000. N.J.S.A. 54A:2-1. Individuals now subject to both the New Jersey Gross Income Tax and the ETT are liable for a sum equal to the greater of the two taxes. N.J.S.A. 54:8A-119.[15] Under the present scheme, the ETT amount due will always be greater since the ETT rates are pegged to the New York personal income tax rate. Compare N.J.S.A. 54:8A-6 (ETT rates from 2% to 15%) with N.J.S.A. 54A:2-1 (Gross income tax rates from 2% to 2½%). However, the full amount of tax collected using ETT rates no longer goes into the Transportation Fund. The amount that would be due by imposition of the Gross Income Tax is deposited in the Property Tax Relief Fund, as are all Gross Income Tax receipts. N.J.S.A. 54:8A-121; N.J.S.A. 54A:9-25; see *N.J.Const.*, Art. VIII, §1, par. 7. Only the excess, which results from application of the higher ETT rates, is allocated to the Transportation Fund. N.J.S.A. 54:8A-120.

As originally enacted, the ETT was to expire on December 31, 1970. L. 1961, c. 32, §57. However, the Legislature extended its life to December 31, 1980. L. 1969, c. 36, N.J.S.A. 54:8A-57. Every year since 1962, the Commissioner of Transportation has certified that a "critical transportation problem" exists in the New York-New Jersey area, and the tax has been collected.

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[14] Only that portion of a non-resident's income derived from sources within New Jersey is subject to the Gross Income Tax. N.J.S.A. 54A:5-5; see N.J.S.A. 54A:5-6 to -8. The same is true regarding the ETT. N.J.S.A. 54:8A-2(b); see N.J.S.A. 54:8A-4, -33(a).

[15] The Income Tax Act originally repealed the ETT. L. 1976, c. 47, N.J.S.A. 54A:9-22. However, this repeal was rescinded before its effective date by L. 1976, c. 65, §1.

Appendix A

IV

The Privileges & Immunities Clause

Stressing the importance of the traditional presumption in favor of a statute's constitutionality, the trial court concluded that the ETT "embodies a rational and equitable allocation of the burdens of state government." Although the court correctly recited the rule of "substantial equality" that governs analysis under the Privileges and Immunities Clause, see *U.S.Const.*, Art. IV, §2; *Austin* v. *New Hampshire, supra,* we conclude that it failed to apply the principle properly to the facts of this case. The court also erred in upholding New Jersey's taxing scheme on the basis of an executive agreement between New York and New Jersey regarding the taxation of each other's residents.

A

The Standard of "Substantial Equality"

Article IV, §2, cl. 1 of the United States Constitution provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.[16]

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[16] As the Supreme Court noted in *Austin*, "[f]or purposes of analyzing a taxing scheme under the Privileges and Immunities Clause the term 'citizen' and 'resident' are essentially interchangeable." 420 U.S. at 662 n.8, 43 L.Ed.2d at 536 n.8. See *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 78-79, 64 L.Ed. 460, 469 (1920).

Appendix A

Although the text does not define the privileges and immunities of national citizenship, it is clear that an interest at stake in this case—the pursuit of one's livelihood free from economic discrimination—is protected by the clause. In its most recent expression of the scope of the Privileges and Immunities Clause, the United States Supreme Court unanimously held that the pursuit of an occupation outside one's home state is a constitutionally protected right. See *Hicklin* v. *Orbeck,* 437 U.S. at 524-525, 57 L.Ed.2d at 404. This principle is well-settled.

> [I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.
>
> [*Toomer* v. *Witsell,* 334 U.S. 385, 396, 92 L.Ed. 1460, 1471 (1948) (footnote omitted)]

Travis v. *Yale & Towne Mfg. Co.,* 252 U.S. 60, 64 L.Ed. 460 (1920); *Ward* v. *Maryland,* 79 U.S. (12 Wall) 418, 20 L.Ed. 449 (1871). The method by which New Jersey allegedly discriminates against non-residents involves another aspect of the privileges and immunities of national citizenship—" 'an exemption from higher taxes or impositions than are paid by the other citizens of the state.' " *Austin* v. *New Hampshire,* 420 U.S. at 661, 43 L.Ed.2d at 535 (quoting *Corfield* v. *Coryell,* 6 F.Cas. 546, 552 (C.C.E.D.Pa. 1825) (No. 3, 230)); see *Ward* v. *Maryland, supra.*

Although legislatures "possess the greatest freedom in classification" in the area of taxation, *Madden* v. *Kentucky,* 309 U.S. 83, 88, 84 L.Ed. 590, 593 (1940), when a violation of the Privileges and Immunities Clause

is alleged, the standard of judicial review must be "substantially more rigorous" than a mere search for rationality in order to "protect [that] constitutional value from erosion." *Austin* v. *New Hampshire,* 420 U.S. at 662-663, 43 L.Ed.2d at 535-536. Absolute equality is not required, however. Inexactitude is permissible when a state fairly attempts to distribute the burdens and costs of government to those receiving its benefits:

> It is enough that the state has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against nonresidents.
>
> [*Travelers' Ins. Co.* v. *Connecticut,* 185 U.S. 364, 371, 46 L.Ed. 949, 954 (1902)]

As announced by the Supreme Court in *Austin,* the rule that has developed is one of "substantial equality of treatment." 420 U.S. at 665, 43 L.Ed.2d at 537.

While invoking close scrutiny, disparity of treatment does not violate this rule if it has a valid justification independent of mere citizenship.

> Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.
>
> [*Toomer* v. *Witsell,* 334 U.S. at 396, 92 L.Ed. at 1471 (footnote omitted)]

See *Hicklin* v. *Orbeck, supra.* A state may therefore impose upon non-residents the additional expenses occasioned by their activities within the state, or the reasonable costs of benefits which they receive from the state. See *Mullaney* v. *Anderson,* 342 U.S. 415, 417, 96 L.Ed. 458, 461-462 (1952); *Toomer* v. *Witsell,* 334 U.S. at 398-399, 92 L.Ed. at 1472-1473; *Travelers' Ins. Co.* v. *Connecticut,* 185 U.S. at 368-369, 46 L.Ed. at 953. See also *Baldwin* v. *Montana Fish and Game Com'n,* 436 U.S. at 402-406, 56 L.Ed.2d at 377-380 (Brennan, J., dissenting); *Davis* v. *Franchise Tax Bd.,* 71 Cal. App.3d 998, 139 Cal.Rep. 797 (Ct.App. 1977).

Although the trial court correctly described the criteria for justifying disparate treatment of non-residents, it did not properly apply them. As the Supreme Court stated in *Toomer* and reiterated in *Hicklin,* "a 'substantial reason for the discrimination' would not exist * * * 'unless there is something to indicate that non-citizens constitute a *peculiar source* of the evil at which the statute is aimed.'" *Hicklin* v. *Orbeck,* 437 U.S. at 525-526, 57 L.Ed.2d at 404 (quoting *Toomer* v. *Witsell,* 334 U.S. at 398, 92 L.Ed. at 1460). Contrary to the trial court's ruling, the burden of demonstrating that non-residents are the "peculiar source" clearly lies with the State. *Hicklin* v. *Orbeck,* 437 U.S. at 526, 57 L.Ed.2d at 405. Once that is proven, the court must then determine whether that discrimination bears a "substantial relationship to the particular 'evil' [the non-residents] are said to present." *Id.* at 527, 57 L.Ed.2d at 405.

Applying this two-fold analysis to the facts before us, we reject plaintiffs' claim that as a matter of law, a transportation problem cannot serve to justify a commuter tax on non-residents. Plaintiffs argue that the

Austin Court rejected such a rationale when it invalidated New Hampshire's commuter income tax on non-residents.[17] In that case, however, New Hampshire did not claim that commuters contributed in any way to a local transportation emergency, nor did that state even allege the existence of such an emergency. The only purpose served by New Hampshire's tax was that of diverting revenue into its general fund. See 420 U.S. at 666, 43 L.Ed.2d at 538.

Were the sole purpose of New Jersey's ETT simply that of diverting revenue for general state purposes, we would similarly conclude that the tax violates the Privileges and Immunities Clause. However, we agree with the State that a transportation problem can serve as a valid independent justification for a discriminatory tax.[18] Unlike the situation in *Austin,* plaintiffs here challenge a specific statutory scheme calling for a transportation tax designed to fund only transportation-related expenditures.

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[17] The mechanics of the ETT are strikingly similar to the invalidated New Hampshire tax. That state taxed non-residents at the rate they would have been taxed by their home states. Because of credits granted by their home states, their total yearly tax liability, like that of New York residents subject to the ETT, remained unchanged.

[18] Plaintiffs also allege that the transportation justification advanced by the State is a "sham," pointing to the fact that the ETT rate structure has consistently been amended to conform to New York's personal income tax, and never in response to any determined change in New Jersey's transportation needs. However, if the practical effect of the tax can be shown to comport with the rule of "substantial equality," the source of the rates employed becomes irrelevant.

While the possibility of a "valid independent reason" exists, we are unable to conclude on the present record that the State has sustained its burden. Acting Transportation Commissioner Mullen testified during his deposition that the problem creating the "transportation emergency" is peak-load commuter demand. Other evidence, however, shows that New York to New Jersey commuters are far outnumbersd by New Jersey residents commuting to New York. See Affidavit of Russell H. Mullen, Acting Commissioner of Transportation at 4; see also Tri-State Regtional Planning Commission, *1970 Census Worker File* (1975); *1977 Certification of Commissioner of Transportation* at 9; *1970 Certification of Commissioner of Transportation* at 11. While commuters living in New York need not be the sole cause of New Jersey's transportation crisis to justify discriminatory treatment,[19] more than merely their identification is required. The State's burden of showing that non-residents constitute a "peculiar source" of an evil would be stripped of meaning if that obligation could be discharged simply by referring to a problem to which non-residents make but a small contribution. Imposition of the ETT cannot be justified if it appears that the tax burden on New York residents is substantially disproportionate to their burden upon New Jersey's transportation facilities.

This is not to say that non-resident commuters cannot be charged for any benefits resulting from New Jersey's subsidization of commuter transportation facilities and expenditures for highway construction and maintenance in

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[19] See *Hichlin* v. *Orbeck*, 437 U.S. at 526, 57 L.Ed.2d at 404, where the Court refers to non-residents "caus[ing] *or exacerbat*[*ing*] the problem the State seeks to remedy * * *." (Emphasis supplied).

northern New Jersey. The Constitution does not entitle non-residents commuters to a "free ride." The State may exact from them a fair share of the cost of adequate transportation facilities without violating the Privileges and Immunities Clause.

The record discloses that expenditures for highway construction and maintenance in northern New Jersey amounted to $910 million during the years 1970 through 1977. Since none of these funds came from emergency transportation taxes,[20] non-residents apparently did not contribute to the cost of providing these vital transportation facilities.[21] The expenditure figures introduced also indicate, however, that ETT funds have supplied a very substantial portion of state expenditures for bus and rail facilities. While non-resident use of such facilities constitutes a very small percentage of total patronage,[22] we recognize that a strict percentage analysis is not required for each separate type of commuter transportation facility. Under the constitutional mandate of "substantial equality," it is only necessary that total payments of the ETT by non-resident commuters be substantially propor-

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[20] See Affidavit of Richard B. Standiford. Since 1976, ETT funds have been held in reserve pending the outcome of this litigation. However, pursuant to L. 1977, c. 138, ETT funds have been called into use for certain highway projects.

[21] It is necessary to ascertain on the basis of a full record whether commuters have provided funds for highway purposes in any other manner during the entire life of the ETT. Presently the record contains data for only an eight-year period.

[22] For example, in the fiscal years 1970 to 1977, ETT funds accounted for approximately 75% of railroad subsidies and approximately 20% of the bus operator subsidies, but New York to New Jersey commuters comprised less than 3% of the ridership.

tionate to the total benefit they derive by virtue of State expenditures for all types of commuter facilities. Stated differently, the ETT would be justified if its burden on New York commuters is substantially commensurate with the benefit they derive from their use of New Jersey's transportation facilities.

The State also emphasizes that New Jersey residents pay other taxes—such as property taxes and sales and use taxes—which non-residents either do not pay or pay substantially less. This assertion has sparked a sharp dispute between the parties as to what tax liabilities can be compared in asserting whether non-residents are in fact being required to pay more than their fair share. Plaintiffs allege that *Austin* made clear that only taxes to which non-residents are not subject can be compared with a discriminatory impost. See *Austin* v. *New Hampshire,* 420 U.S. at 659 n.3, 662 n.8, 43 L.Ed.2d at 534 n.3, 536 n.8. Noting that property taxes are paid by any non-resident who owns property in New Jersey, plaintiffs argue that such taxes do not qualify as "taxes imposed upon residents alone" under *Austin.* See 420 U.S. at 665, 43 L.Ed.2d at 538.

We do not agree that taxes which non-residents may pay must be excluded from the "substantial equality of treatment" analysis. While " 'something more is required than bald assertion' * * * to establish the validity of a taxing statute that on its face discriminates against non-residents," *Austin,* 420 U.S. at 655 n.10, 43 L.Ed.2d at 538 n.10 (quoting *Mullaney* v. *Anderson,* 342 U.S. at 418, 96 L.Ed. at 462), the question is still one of impact in fact. The State has introduced evidence lending support to the conclusion that residents pay a much greater percentage of New Jersey's property and sales taxes than non-residents. The discriminatory impact of the ETT

cannot be offset, however, by the fact that residents pay more total tax dollars than non-residents. Even a *per capita* comparison is inappropriate unless its scope is restricted to collections for transportation services, the asserted ground of justification for the ETT. To sustain the tax, there must be a showing that the impact of ETT on non-residents, along with their other contribuions for public transportation expenses, is substantially offset by the benefits they receive from transportation services.

The State introduced the affidavit of John F. Laezza, Director of the Division of Local Government Services, Department of Community Affairs, in which he asserts that "[i]n 1975 the municipalities and county governments in the ten northern counties spent approximately $12,645,000 for services directly allocable to commuters from New York." This figure allegedly represents the non-resident commuters' pro rata share of the total public safety and public works expenditure made by the ten counties and their municipalities. As explained by Director Laezza, this strict percentage computation was based on the theory that a person who commutes to and works in New Jersey for a part of the day utilizes these facilities to the same extent as a New Jersey resident.[23] This assumption is questionable; moreover, it is only to the extent these benefits arise from local maintenance of transportation facilities that they should be included in the constitutional analysis.

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[23] Director Laezza testified at his deposition that he computed this figure by calculating the number of New York to New Jersey commuters as a percentage of the total population of the ten northern counties (including these commuters) and then allocating to the non-resident commuters that percentage of the total expenditures for public safety and public works in the ten counties.

We reject the State's argument that since the effect of the challenged tax is in fact no more onerous than the liability taxpayers would otherwise incur to New York, it does not violate the privileges and immunities of non-residents. As the Supreme Court noted in *Austin*, while such an argument may have "initial appeal, it cannot be squared with the underlying policy of comity to which the Privileges and Immunities Clause commits us." 420 U.S. at 666, 43 L.Ed.2d at 538.

The evidence here presented falls far short of showing that the non-residents are taxed only to the extent of their contribution to the transportation problem. We are therefore unable to apply the correct constitutional standard of "substantial equality" to the record before us. A remand is accordingly necessary to permit a full exploration of the benefits and burdens to non-residential commuters occasioned by State transportation programs and imposition of the ETT. In view of our disposition of this case, we now set out guidelines for further trial proceedings.

On remand, evidence should be introduced to enable the trial court to compare the transportation benefits New York residents receive and the tax contributions they are required to make. The data must therefore include statistics on annual state and local expenditures—identified by source—for commuter rail and bus services and for construction and maintenance of highways used by interstate commuters. Figures on the amount and application of ETT monies must also be presented.[24] Commutation

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[24] The evidence thus far presented covers only the years 1970-1977. The entire effect of the ETT should be determined from a full record of its operation. Inequality in any single year may not be indicative of overall inequality. "Oversubsidization" in one area may be offset by "undersubsidization" in another.

figures must be introduced for the years during which non-residents paid emergency transportation taxes. The total number of New Jersey to New York commuters and the proportion by which they exceed New York to New Jersey commuters would be a relevant consideration. Travel figures must also take into account the substantial amount of intrastate use of all facilities funded.

Only when the State supplies such an accounting can the relationship between benefits and burdens be properly assessed. Once these computations are submitted, the court can then make a fully informed judgment on whether the problems of peak-hour commutation by New York residents justifies imposition of the ETT.

B

The 1962 "Accord"

The parties disagree over the existence and legal effect to be given the alleged "accord," "agreeemnt" or "arrangement" entered into by New York and New Jersey in 1962. See *supra* at —— (slip op. at 3-4).

Plaintiffs argue that no such agreement ever existed and that the alleged accord was nothing more than a joint press release by the two governors. They note that the only "agreement" in the record relates solely to procedures for tax withholding. Defendant contends that the states of New York and New Jersey had entered into a "reciprocal arrangement" to apportion equitably the financial burdens of government among citizens who live in one state and earn income in the other. Since this arrangement insured that commuters from New York would suffer no "additional overall tax burden," the State

maintains that the scheme is not repugnant to the Privilileges and Immunities Clause. The trial court agreed, noting that

> It boggles the mind to consider a situation where two states could not make adjustments between them and pass reciprocal-type legislation (which would allow either to pass tax laws) whereby the citizens of two states were not financially affected.

The trial court erred in its assessment of the effect of such interstate agreement. We need not decide, therefore, whether the existence of an enforceable interstate agreement would save the present scheme from invalidity. Even assuming, as the State claims, that New York could restrict its prerogative for fashioning tax policy by agreement with New Jersey, it is clear that New York has not done so here.

In the recent case of *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452, 54 L.Ed.2d 682 (1978), the United States Surpeme Court addressed claims that the Multistate Tax Compact entered into by seven states creating a Multistate Tax Commission violated the Compact Clause of the Federal Constitution, *U.S. Const.*, Art. I, §10, cl. 3,[25] since no congressional approval had been given. The Court held that no violation had occurred since no state had relinquished any of its sovereign power in entering the compact. Under Article VII of the compact, the Multistate Tax Commission was given the power to adopt advisory regulations which would have "no force in any member State until adopted by that State in accordance with its own law." 434 U.S. at 457, 54 L.Ed.2d

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[25] "No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State * * *."

at 692. If any State chose to adopt the proposed regulations, it could request the Commission to perform an audit. The Commission could seek compulsory process in aid of its auditing power in the courts of any state that had specifically adopted Article VIII of the compact by statute. Individual states retained "*complete control over all legislation and administrative action* affecting the rate of tax, the composition of the tax base (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due." 434 U.S. at 457, 54 L.Ed.2d at 692 (emphasis supplied).

After an exhaustive survey of the history of the Compact Clause, the Court rejected a literal interpretation which

> would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States.
>
> [434 U.S. at 459, 54 L.Ed.2d at 694]

Instead, the Court reaffirmed the view that the

> "application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'"
>
> [434 U.S. at 471, 54 L.Ed.2d at 701 (quoting *New Hampshire* v. *Maine*, 426 U.S. 363, 369, 48 L.Ed. 2d 701 (1976) and *Virginia* v. *Tennessee*, 148 U.S. 503, 519, 37 L.Ed. 537, 543 (1893)]

Under that rule, the Multistate Tax Compact was held not to require congressional approval:

> [T]he test is whether the Compact enhances state power quoad the National Government. This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission: each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, as noted above each State is free to withdraw at any time.
>
> [434 U.S. at 473, 54 L.Ed.2d at 702]

Following this analysis it is clear that if the 1962 Accord were interpreted to bind New York's power over the extension of tax credit to its residents, it would involve an impermissible relinquishment of that state's sovereign power. New Jersey would then be able to dictate portions of New York's taxation policy by enforcing the terms of the Accord. Under the rule of *United States Steel Corp.* v. *Multistate Tax Commission,* such an agreemest requires congressional approval. Since no such approval was given, the Accord cannot be relied on by the State here as an enforceable agreement. The credit granted by New York is a matter of legislative grace upon which New Jersey may not rely to support the constitutionality of the ETT:

> [T]he constitutionality of one State's statutes affecting nonresidents [cannot] depend upon the present configuration of the statutes of another State.
>
> [*Austin* v. *New Hampshire,* 420 U.S. at 668, 43 L.Ed.2d at 539]

Since the present interaction of the ETT with New York's personal income tax law is susceptible to change at any

time by the legislature of either state, the ETT must independently pass muster under the Privileges and Immunities Clause.

The parties also disagree over the effect of a footnote in the *Austin* opinion regarding interstate cooperation in tax matters. The footnote reads:

> Neither *Travis* nor the present case should be taken in any way to denigrate the value of reciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a disadvantage upon nonresidents, not reciprocally favorable treatment of nonresidents by States that coordinate their tax laws.
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> [420 U.S. at 67 n.12, 43 L.Ed.2d at 539, n.12]

In light of *Austin's* explicit statement that the constitutionality of a state's laws cannot depend upon the laws of a sister state, any reference to such interstate cooperation cannot be read to mean that the laws of an individual state need not withstand independent scrutiny under the Privileges and Immunities Clause. Reciprocally favorable treatment of non-residents does not violate the Privileges and Immunities Clause; New Jersey's unfavorable treatment of New York residents may. Resolution of this issue must await a full record.

V

Equal Protection

Plaintiffs allege that the ETT violates the Equal Protection Clause of the Fourteenth Amendment by placing an impermissible burden on their right to travel. They

claim that since this right is "fundamental" the State must show that the ETT serves some "compelling state interest."

The constitutional right to travel interstate, as interpreted by the United States Supreme Court, is not implicated in this case. This right does not encompass mere movement. See *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 255, 39 L.Ed.2d 306, 313 (1974). It concerns interstate migration—the right "to migrate, resettle, find a new job, and start a new life." *Shapiro* v. *Thompson,* 394 U.S. 618, 629, 22 L.Ed.2d 600, 612 (1969). For the State to be required to show a compelling interest, the classification must penalize the exercise of the right of migration. *Memorial Hospital* v. *Maricopa County,* 415 U.S. at 258, 39 L.Ed.2d at 315; *Dunn* v. *Blumstein,* 405 U.S. 330, 31 L.Ed.2d 274 (1972); *Shapiro* v. *Thompson,* 394 U.S. at 634, 638 n.21, 22 L.Ed.2d at 615, 617 n.21.

Since migration is not involved in this case, plaintiffs' attempt to clothe the right to travel protected by the Privileges and Immunities Clause as a "fundamental interest" under the Equal Protection Clause is misconceived. Plaintiffs do argue that the residency classification embodied in the ETT deters "migration" from New Jersey to New York. However, it is clear that these New York residents lack standing to assert the equal protection claims of New Jersey residents. See *Craig* v. *Boren,* 429 U.S. 190, 193-195, 50 L.Ed.2d 397, 404-405 (1976); *Warth* v. *Seldin,* 422 U.S. 490, 45 L.Ed.2d 343 (1975); *Broadrick* v. *Oklahoma,* 413 U.S. 601, 37 L.Ed.2d 830 (1973); *United States* v. *Raines,* 362 U.S. 17, 4 L.Ed.2d 524 (1960).

We also reject plaintiffs' attempt to characterize non-residents as a "suspect class." No decisional law supports such an interpretation. *Austin* is cited for the proposition that non-residents are not represented in New Jersey's Legislature—one characteristic of a suspect class. In that case, however, it was unnecessary to address the non-resident plaintiffs' equal protection claims in light of its disposition of the privileges and immunities issue. 420 U.S. at 668, 43 L.Ed.2d at 539. Similarly, in *Hicklin* and *Mullaney,* the Court did not reach the equal protection claims once a violation of the Privileges and Immunities Clause was found. *Hicklin,* 437 U.S. at 534 n.19, 57 L.Ed.2d at 410 n.19; *Mullaney* v. *Anderson, supra.* In *Baldwin* v. *Montana Fish and Game Comm'n,* 436 U.S. 371, 56 L.Ed.2d 354 (1978), the Court held that a legislative classification based on residency need only be rational to be valid under the Equal Protection Clause. See 436 U.S. at 389, 390, 56 L.Ed.2d at 369. We therefore conclude that non-residents are not a suspect class and that application of the strict scrutiny standard under the Equal Protection Clause is not required.

Since no fundamental interest or suspect class is here involved, the trial court was correct in assessing the ETT under the "rational relation" standard. See *San Antonio Sch. Dist.* v. *Rodriquez,* 411 U.S. 1, 36 L.Ed.2d 16 (1973); *McGowan* v. *Maryland,* 366 U.S. 420, 6 L.Ed.2d 393 (1961); *Taxpayers Ass'n of Weymouth Tp.* v. *Weymouth Tp.,* 80 N.J. 6, 39-40 (1976), *cert.* den. *sub. nom. Feldman* v. *Weymouth Tp.,* 430 U.S. 977, 52 L.Ed.2d 373 (1977).

In determining whether the classification employed by the State bears a rational relation to a legitimate governmental purpose, it is important to remember that states have been accorded great latitude in the field of taxation:

> Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.
>
> [*Madden* v. *Kentucky,* 309 U.S. 83, 88, 84 L.Ed. 590, 593 (1940) (footnotes omitted)]

See *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U.S. 356, 35 L.Ed.2d 351 (1973); see also *McKenney* v. *Bryne,* —— N.J. —— (1980). There is no question that the alleviation of a "transportation emergency" is a legitimate governmental purpose. The remaining issue is whether there is any reasonably conceivable state of facts which would afford a rational basis for imposing the ETT only on the class consisting of New York residents earning income in New Jersey. We conclude that there is. New York residents who commute to New Jersey contribute significantly to the excessive demands placed on New Jersey's transportation facilities in the New York-New Jersey area. It is certainly conceivable that New Jersey residents are called upon to pay their fair share of transportation costs by the operation of other state and local taxes. Mathematical equality of impact is not required. *Dandridge* v. *Williams,* 397 U.S. 471, 485,

25 L.Ed.2d 491, 501-502 (1970).[26] Again, the nature of the field of taxation requires judicial tolerance of imperfections in legislative schemes:

> In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal scheme become subjects of criticism under the Equal Protection Clause.
>
> [*San Antonio Sch. Dist.* v. *Rodriquez,* 411 U.S. at 41, 36 L.Ed.2d at 48 (footnote omitted)]

Plaintiffs have not met their burden of demonstrating that the classification lacks any rational absis. *Madden* v. *Kentucky,* 309 U.S. at 88, 84 L.Ed. at 593; *Taxpayers Ass'n of Weymouth Tp.,* 80 N.J. at 40. We therefore affirm the ruling of the trial court upholding the ETT under the Equal Protection Clause.

VI

Disposition

We conclude that a ruling on the constitutionality of the ETT cannot be made on the present record. As noted above, the trial court failed to apply the proper analysis under the Privileges and Immunities Clause. By drawing the issue too narrowly—"whether or not the *Austin* case is dispositive of the [ETT] legislation"—the court could not resolve the factual issue of whether non-residents

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[26] Thus, the fact that there may be some non-commuting New York residents who must pay the ETT does not necessarily invalidate the classification under the Equal Protection Clause.

have been overcharged.[27] The complexity of this determination and the far-reaching effects of a decision on the issue of the statute's constitutionality make this case inappropriate for the summary disposition requested by the parties. See R. 4:67. A full record should therefore be developed. *Cf. Jackson* v. *Muhlenberg Hospital,* 53 N.J. 138, 142 (1969) (a "maximum of caution" is necessary when a ruling would "reach far beyond the particular case."); *Swiss Village Assocs.* v. *Mun. Council of Wayne Tp.,* 162 N.J.Super. 138, 142 (App.Div. 1978); *Lusardi* v. *Curtis Point Prop. Owners Ass'n,* 138 N.J. Super. 44, 51 (App.Div. 1975); *Bennett* v. *T & F Distrib. Co.,* 117 N.J.Super. 439, 445-446 (App.Div. 1971), certif. den., 60 N.J. 350 (1972).

We therefore remand the matter to the trial court for proceedings consistent with this opinion. The court should follow the legal analysis outlined above, which requires the State to demonstrate that the tax imposed on non-residents charges them only for their share of the transportation problem they cause or the benefits they receive. While mathematical certainty is not required, see *Travelers' Ins. Co.* v. *Connecticut,* 185 U.S. at 371-372, 64 L.Ed. at 954, the present record does not support a conclusion that the discrimination practiced against non-residents bears the requisite "close relation" to the "transportation emergency" advanced as its justification. See *Toomer* v. *Witsell,* 334 U.S. at 396, 92 L.Ed. at 1471.

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[27] We agree with the trial court, however, that the act itself contains the necessary safeguards for ensuring application of funds collected to transportation facilities serving commuters. We therefore do not determine whether there has been any misapplication of funds as the statute has been applied.

Appendix A

The judgment of the Superior Court, Chancery Division, is vacated insofar as it declares the Emergency Transportation Tax Act constitutional under the Privileges and Immunities Clause. The matter is remanded for a plenary hearing consistent with this opinion.

May 16, 1980

Hon. Theodore W. Trautwein
Mr. Conrad J. Roncati

Re: Salorio v. Glaser
A-60 September Term 1979
Docket No. 15,921

Dear Sirs:

The court has requested that the following correction be made in Justice Pashman's majority opinion decided March 26, 1980 in the above entitled matter.

On page 44, first line from the top of the page, the words demonstrate that should be deleted and replaced with the words produce evidence enabling the court to determine whether . . .

So that the sentence beginning on page 43 will now read as follows:

> The court should follow the legal analysis outlined above, which requires the State to produce evidence enabling the court to determine whether the tax imposed on non-residents charges them only for their share of the transportation problem they cause or the benefits they receive.

Appendix A

I would very much appreciate your making this correction.

Very truly yours,

JOSEPH DEMARCO
Joseph DeMarco
Supervisor

JD/tsg

cc: Hon. Sherwin D. Lester
Connell, Foley & Geiser, Esqs.
Stephen Skillman
Assistant Attorney General

APPENDIX B

Opinion of the Superior Court of New Jersey, Chancery Division, dated October 24, 1978 (as amended October 31, 1978 and November 8, 1978)

October 24, 1978

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Re: John Salorio, et al. v. Sidney Glaser, Director of the Division of Taxation, Dept. of the Treasury of the State of New Jersey.
Docket No. C-3628-76

Gentlemen:

I. Introductory Statement

Plaintiffs, Salorio, et al. challenge the constitutionality of N.J.S.A. 54:8A-1-57 and the so-called "Emergency Transportation Tax" called for therein. They rely on the United States Supreme Court decision of *Austin* v. *New*

Hampshire, 420 U.S. 656 (1975). In a preliminary statement in their brief in support of their motion for summary judgment plaintiffs note:

> In *Austin,* the Supreme Court struck down a commuter tax imposed by New Hampshire upon nonresidents which was identical in its operation and discriminatory effect to the New Jersey commuter tax imposed upon New Yorkers.
> (Brief at p. 1)

Plaintiffs urge this Court to accept their position that *Austin* is dispositive of this case. That is the thrust of plaintiffs' attack. Every memorandum or brief submitted by plaintiffs relied upon *Austin.* All of their correspondence commented to *Austin.* At each appearance they urged this Court to accept their theme that the case at bar is indistinguishable from *Austin.*

Defendant, State of New Jersey, also cites *Austin* arguing that *Austin* is not only distinguishable but is supportive of the State's position. It posits that the Act is not only constitutional as written, but morally as well as logically justified.

Now after many thousands of words, after the introduction into evidence of numerous documents and disputes over the admissibility thereof, and after the insertion into this litigation of many side issues, the Court is faced with the same question as initially presented. Simply stated, Is the tax unconstitutional under the doctrine of *Austin* v. *New Hampshire*?

Plaintiffs argue that under the tax one set of rates applies to New Jersey residents, while a different and perhaps a higher set of rates applies to New York residents. (Plaintiffs' brief of October 28, 1977, p. 8.) In that same

brief, plaintiffs, referring to the statutory sections, N.J. S.A. 54:8A-1, *et seq., note*:

> As we shall describe below the 'Emergncy Transportation Tax' more properly should be called 'Commuter Income Tax' or 'Commuter Income Tax on New York Residents' and we shall so refer to it hereafter.

New Jersey, on the other hand, acknowledges the difference in rates but justifies the Act on the theory that a transportation emergency exists and the fund is used exclusively to finance projects and programs to help alleviate the transportation problems between New York and New Jersey. New Jersey further urges this Court to accept as a foundation for sustaining the tax an accord (agreement) reached between the States of New York and New Jersey which precludes the State of New York from now complaining.

That New York is the real party in interest is apparent. The phrase "real party in interest" is not used in any technical sense. The litigation is financed by the State of New York and it is apparent that it is New York and the New York Legislature and administration which is interested in the results hereof. Surely Salorio and the other plaintiffs have little financial interest herein. The credits available to the plaintiffs by the State of New York make it apparent that the ultimate total out-of-pocket tax and the cost to plaintiffs is not affected by the tax here under purview. However, the same was true in *Austin.*

This Court is called upon to decide a constitutional issue that could be rendered moot at any time by either the State of New York or the State of New Jersey with a stroke of a legislative pen. I have delayed rendering this

decision in the hope that the Legislatures of the States of New York and New Jersey would meet their obligations to the public and to their own citizens by determining what should and should not be done to properly balance the burden of interstate commutation costs. The States have failed to act and this Court is called upon to render, in effect, an advisory opinion, well knowing that when the inevitable appellate phases of this litigation have passed, either state that feels aggrieved can by legislative action change the entire result contemplated or suggested by any judicial decree.

A history of this litigation and an examination of the actions and interactions between the states, including the legislative approach of each of the states to the commuter tax problem, is in order.

II. Statement of Facts and History of Litigation

That the interstate transportation problems between New York and New Jersey are undoubtedly more substantial than those of other states is apparent. There have been several interstate compacts and understandings during the past years between New York and New Jersey. The creation of the New York-New Jersey Port Authority (N.J. S.A. 32:1-1, *et seq.*) and the New York and New Jersey Transportation Agency (N.J.S.A. 32:22A-1, *et seq.*) are but two of these formal arrangements intended to deal with the transportation problem. In addition there have been numeruos "understandings" or "agreements" reached between the two states. It is urged by the State of New Jersey that the interstate contracts are only able to deal with rather limited interstate transportation problems and that New Jersey must bear the cost of the operation of

mass transit, bues and trains. The State further urges that the revenues required to fund these interstate transportation projects may properly be raised by taxation. I acecpt the logic of this argument subject to constitutional limitations.

The Emergency Transportation Tax Act, N.J.S.A. 54:8A-1, *et seq.*, was passed in 1961. New Jersey, at that time, recognized the typical problems in the New York-Nothern New Jersey transportation area. The Act provided that the tax there contemplated was to be imposed only if the State Commissioner of Taxation certified to the State Treasurer the existence of a "critical transportation problem" between New Jersey and a bordering state (N.J.S.A. 54:8A-5(c)). All of the Emergency Transportation Tax revenues are to be paid into a special transportation fund and except for the provision for costs of administering the Act, the funds received are to be used exclusively to finance projects and programs involving transportation problems between New York and New Jersey. See N.J.S.A. 54:8A-20. Section 22 of the Act specifies that if any of the monies in the fund are used for a purpose not proper under the Act, the taxpayer has a right to a refund or credit equal to a prorated share of the fund. Section 57 of the Act provides for the suspension of the tax in the event that any of the monies in the fund are applied to purposes other than those specified in the Act.

Originaly, the Act was applicable solely to New Jersey residents working in New York. This was because the Act provided a credit against the tax for non-residents for "any income tax for the taxable year imposed by another critical area state". This non-resident credit was limited to residents of jurdisdictions which granted similar type credits to New Jersey residents (N.J.S.A. 54:8A-16(A)

(2)(a)). New York granted similar credits to New Jersey residents. Therefore, New Jersey allowed New Yorkers the "non-resident" credit.

In 1962, however, the New York Legislature repealed that portion of the New York Personal income tax law permitting the credit for taxes paid to New Jersey by New Jersey residents working in New York. Since New York no longer granted similar credits to New Jersey residents, New York residents could not claim credit under the Emergency Transportation Act. New York's action was retroactive and the question arose as to the validity of the application thereof. An executive accord was reached between the governors of the two states and the following executive statement emanated on May 6, 1962:

> Governor Richard J. Hughes of New Jersey and Governor Nelson A. Rockefeller of New York announced today that they had reached an understanding in regard to the administration and enforcement of the personal income tax laws of their respective States as they affect residents of the other State.
>
> Governor Rockefeller announced that New York, under legislation enacted at the 1962 legislative session, will allow its residents a credit against their New York State personal income taxes for income taxes paid to New Jersey under the New Jersey Emergency Transportation Act enacted in 1961, as amended.
>
> Governor Hughes announced that he would submit to the New Jersey Legislature on Monday legislation which will grant to New Jersey residents a credit against the New Jersey Emergency Trans-

portation Tax for income taxes paid to the State of New York under New York's personal income tax law, as amended in 1962.

In addition, it was agreed that neither State would contest nor participate in contesting the right of the other to levy and collect the taxes imposed by the two laws on residents of the other; and that each State would assist and cooperate with the other in the administration and enforcement thereof so as to assure to the citizens of each who are directly involved the greatest degree of certainty as to their responsibilities under the two laws.

The Governors expressed the belief that this agreement will clarify for the New York and New Jersey commuters their status in regard to the income tax laws of the two States and will insure certainty in the application and administration of such laws.

The Governors stated that they are taking this action in the interest of promoting interstate cooperation and pledged their continued cooperation in other matters affecting their citizens who live in one state and work in the other. Noting the progress that has been made recently in such matters as the Hudson and Manhattan Railroad, the World Trade Center, and the program for an integrated regional transportation network, the Governors expressed their confidence of still further progress through similar joint action, conducted in a spirit of harmony, cooperation and good will.

Following the statement, New Jersey enacted Chapter 70 of the Laws of 1962 which is still effective, which act

afforded a credit to New Jersey residents against the Emergency Transportation Tax Act for any income tax imposed by New York on income earned within New York (N.J.S.A. 54:8A-16(B). By virtue of the action and interaction between the two states and specifically the action on the part of New York retroactively repealing the "nonresident" credit of the New York personal income tax and the enactment by New Jersey of the Emergency Transportation Tax Act, a result, apparently unintended by the legislation, ensued. The Emergency Transportation Tax is being paid by New Yorkers commuting to work in New Jersey rather than the originally intended persons, that is, New Jersey residents working in New York. Although the Act was originally scheduled to expire on December 31, 1970, it was extended to December 31, 1980. L. 1969, c. 36 (N.J.S.A. 54:8A-57). There was a bit of legislative action whereby the Emergency Transportation Tax Act was repealed at the time of the enactment of the New Jersey gross income tax in 1976, but that action was later reversed by the New Jersey Legislature. Thus, the Emergency Transportation Tax Act continues to be in effect.

The scope of the gross income tax (N.J.S.A. 54A:1-1, *et seq.*) encompasses the income tax under the Emergency Transportation Tax Act and the persons who are subject to the Emergency Tax Act are also subject to the gross income tax. However, the law does provide (N.J.S.A. 54:8A-119) that where an individual is subject to both taxes his liability shall not exceed a sum equal to the greater of the two.

Plaintiffs point out that since 1961 New Jersey has taxed New York residents who derive income in or from the State of New Jersey at rates that range from 2%

to 15% of taxable income but that New Jersey residents paid no income tax whatsoever on their incomes derived in New Jersey until 1976 and that the income rate since that time is but from 2 to 2½% under a statute which was temporary at the time the briefs in this case were drawn. They urge that the legislative scheme which created this discrimination against New York residents is, in fact, the act in question, that is the "New Jersey Emergency Transportation Tax Act". Plaintiffs point out that there is a close similarity between the "Commuter Income Tax on New York Residents" and the income tax that New York State imposes upon people who work in New York, and that changes in the New York statute ordinarily bring about identical changes in New Jersey. In fact, it is urged by plaintiffs that only New York residents are subject to the tax because the statute provides to New Jersey residents working in New York a credit against the tax for income taxes that they pay to New York. Since the New York income tax is identical with the rate in the Commuter Income Tax, residents of New Jersey who work in New York pay taxes to New York which equal the amount of the Commuter Income Tax.

III. Arguments Presented

Plaintiffs' legal argument is based on the Privileges and Immunities Clause of the United States Constitution. Plaintiffs argue that since Art. IV, Sec. 2. Cl. 1, requires each state to treat citizens of every other state on a par with its own citizens, the citizens of New York are entitled to be exempt from any higher taxes or excises than are imposed by New Jersey on its own citizens and they cite *Ward* v. *Maryland,* 12 Wall. 418, 20 L. Ed.

449 (1871) and *Austin* v. *New Hampshire,* 420 U.S. 670, 95 S.Ct. 1191 (1975).

Plaintiffs conclude that a proper application of *Austin* requires this Court to declare the New Jersey Act unconstitutional.

It is also urged by the plaintiffs that a purported "transportation problem" does not and cannot make the Commuter Income Tax constitutional; that the Commuter Income Tax violates the Equal Protection Clause of the United States Constitution by charging New Yorkers far more than their fair share; that the purported transportion problem is irrelevant as a matter of law and is a sham (that is, that in actual operation the Commuter Income Tax bears no relationship to the use by commuters from New York of New Jersey's transportation facilities); and that in general the rationale of *Austin* and the facts justify quick disposition of any defenses raised by the State of New Jersey.

New Jersey, on the other hand, challenges the contention of plaintiffs that the *Austin* case is dispositive of the issues. It urges that plaintiffs have no real interest in this litigation and that the State of New York which has financed and directed this suit is attempting to "cloak the Emergency Transportation Tax in the costume of the New Hampshire Commuter's Income Tax", (defendant's reply memorandum, p. 1) and in so doing is utilizing the holding in *Austin* to avoid a proper and solemn, if not formal, agreement between the two states.

New Jersey concedes that there is some similarlity between the Transportation Tax Act here in New Jersey the New Hampshire tax in that "(1) each tax is effectively incident only on non-resident commuters and (2) under each tax these commuters suffer no financial

harm," *Id.* p. 2, but alleges sufficient differences to warrant this Court's distinguishing *Austin.*

What then do we have before us? New Jersey enacts a tax and plaintiffs state that the *Austin* case compels a determination that the statute is unconstitutional. New Jersey argues that a transportation emergency exists which justifies the tax. Plaintiffs argue that the transportion problem is irrelevant as a matter of law and that *Austin* governs. Plaintiffs urge a blatant violation of the privileges and immunities clause. New Jersey urges that there is no violation of the Privileges and Immunities Clause or the Equal Protection Clause of the federal Constitution as asserted by plaintiffs. Plaintiffs respond that *Austin* governs. New Jersey urges that this case differs from *Austin* in that the tax purposes were different and that in New Jersey there was a specific proper use for the created fund, while in New Hampshire the tax was merely used for general revenue purposes. Plaintiffs reply that the *Austin* case shows no such distinctions and that *Austin* governs. New Jersey urges that the funds created by the tax are expended for the benefit of both New York and New Jersey residents. Plaintiffs reply that by any other name the situation is the same as *Austin,* that, in fact, the benefits do not run to New York commuters in proportion to the taxes paid by them and, again, that *Austin* governs. The State of New Jersey urges that the action of New Jersey under the Emergency Transportation Tax is consistent with the 1962 accord between the two states in question and consistent with the "arrangements" between the two states from 1962 until 1975 when the *Austin* decision came down and that, therefore, New York is an indispensable party to this litigation. Plaintiffs note that *Austin* expressly held that individuals such as plaintiffs have the right to chal-

lenge a commuter income tax on non-residents. They also point out that the Supreme Court has expressly held that New York State is not entitled as a substantive matter to enforce the constitutional claims here asserted. Thus, New York cannot be a "real party in interest", citing *Pennsylvania* v. *New Jersey,* 426 U.S. 660 (1976).

IV. Discussion

More technicalities have arisen than are justified under the issues raised either by the pleadings or by counsel. First of all, it does not require detailed oral argument and pages of legal memoranda to reach the conclusion that the State of New York per se may not in this litigation raise the question of those constitutional guarantees that extend only to individuals. The crux of *Austin* and *Pennsylvania,* hereinabove cited, make this apparent. It is somewhat surprising that New Jersey urges the "real party in interest" argument in this Court. Equally, it was not necessary for the State of New Jersey to seek depositions and discovery of the administrators of New York State, such as the comptroller. The question before this Court is not a question of dollars. It is a question of principle and right. This Court intends to meet only one issue, the effect of the *Austin* case.

As to questions regarding the actual disposition of the funds, administrative determination is the proper procedure. If in fact those issues are relevant, it may very well be that defendant was correct, in part, that plaintiffs have failed to exhaust their administrative remedies. If, in fact, the legislative enactment and the legislative scheme as formalized by the statute in question is constitutional, and if the goals and aims are permissible, then

remedies exist within the statutory scheme and by separate litigation to correct abuses by this State if there has been any misappropriation of the funds constitutionally taxed and collected from New York residents. Thus the safeguards exist to avoid an unconsitutional application of a constitutional statute.

This Court must and will determine the simple question of whether or not the *Austin* case is dispositive of the legislation.

Some preliminary findings are required:

1. Salorio and the other plaintiffs and others similarly situated are not financially affected by the results of this litigation under the existing state of the law.

2. Only the State of New York is beneficially interested in the results of this litigation from a financial viewpoint. While New York State is, in fact, financing this litigation and in effect directing it through the utilization of the plaintiffs herein, such a situation does not make them the "real parties in interest" to the end that they are indispensable parties to this litigation or that defendant's motion to dismiss on that ground should be granted.

3. There was in 1962 and there continued thereafter an arrangement between the States of New York and New Jersey, their governors and their legislators which accepted as valid the tax situation now being challenged. The position of plaintiffs is that even recognizing such a compact or agreement exists:

> had they (the states) solemnly agreed to it way back when, it would have fallen in 1975 with the Supreme Court finding of unconstitutionality.

(Transcript of February 23, 1978, p. 7, lines 3-6.) This position can only be sustained if the Act is unconstitutional on its face.

4. There is nothing inherently immoral or improper in the states' arriving at a compact or agreement which provides for taxing as suggested and required under the existing statutes. The only challenges there can be to such a compact or arrangement are the arguments proffered in *Austin* that the tax in question violates the Privileges and Immunities Clause and the Equal Protection Clause of the United States Constitution.

5. The determination by the administrative authorities in New Jersey of the existence of a "transportation crisis" in addition to being presumptively accurate is justified by the facts and the Court finds that such a problem exists.

6. The purposes expressed in the statute for the utilization and allocation of the funds collected under the challenged tax are valid and bear a direct relationship to the crisis referred to.

7. That purpose is to alleviate transportation problems encountered by interstate commuters, and thus, if the Act is administered in accordance with the express purposes, then in fact taxpayers, such as plaintiffs, will receive a direct benefit from the expenditure of the funds. The Court does not pass on the quantum of the benefit at this time. The Court notes that the revenues from the New Jersey tax should be used solely to alleviate transportation problems encountered by the interstate commuters. If this is not being done, other remedies are afforded to the plaintiffs. See N.J.S.A. 54:8A-22.

Appendix B

8. It is fundamentally fair that a state receive funds from non-state residents who work in that state for the services rendered by the state for their benefit, whether it be transportation or other services.

This Court is under the solemn obligation to follow the doctrines involving federal law set down by the Supreme Court of this country. *Austin* v. *New Hampshire* is now a part of the supreme law of the land. *Austin* declared unconstitutional the taxing statute of the State of New Hampshire. The holding in *Austin* is here being utilized by plaintiffs as the standard by which to measure the constitutionality of the Emergency Transportation Tax Act of this State. In challenging the constitutionality of a statute in this court, the challenger is faced with all of the law raising presumptions in favor of the legislation in question at every level of the litigation.

By enactment of legislation, a constitutional measure is presumed to be created. The courts will not, save in very limited circumstances, presume that a legislative body exceeded its authority or intended to violate the Constitution. This presumption is based, at least in part, on the doctrine of separation of powers which forbids one branch of goverment to encroach on the duties and powers of another. The legislative branch of our State is entitled to the greatest respect by our courts. The presumption that the legislative action is constitutional is a strong one and heavy burden is placed upon the challenger to rebut that presumption.

Consequently, the holding in *Austin* must and will be construed as narrowly as possible. There are differences between the situation and the statute which was involved in *Austin* and the situation and the statute presented to this Court.

Appendix B

The simplistic approach of plaintiffs that *Austin* governs and need not be examined in depth is simply not justified. *Austin* is not identical to the situation here. Nothing in *Austin* indicates any reason for the enactment of the New Hampshirs statute other than to raise general revenue. The statute before this Court indicates the use of the revenues collected under the Act to the transportation fund. There is no indication of dedication in *Austin*. The purpose of the New Jersey Act is the alleviation of the commuter problem. Thus, a direct benefit is intended to inure to New York commuters such as Salorio. The *Austin* situation is silent on this issue.

Thus, the New Jersey Act was passed for a specific purpose while the New Hampshire Act was merely passed for general revenue purposes. One cannot assert discrimination in the lay sense of the word since the commuter is not harmed financially. To the contrary, these non-resident commuters do receive a direct benefit from the tax. Surely the New Jersey legislation, on its face, embodies a rational and equitable allocation of the burdens of state government. That is all that the privileges and immunities clause or the equal protection clause here require.

Article IV, Sec. 2 of the United States Constitution provides that "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States". This provision prohibits discrimination by a state, but only when there is no substantial reason for the discrimination other than citizenship or residence in another state. The inquiry in each case must be whether substantial reasons do exist and whether the degree of discrimination between residents and non-residents bears a close relation to the reasons.

The rule requiring substantial equality for residents of the taxing state and non-resident taxpayers dictates that

the tax must be sustained. The scheme is logical and fair. During part of the time involved here New Jersey residents paid this tax. During the period when they did not pay any income taxes at all, residents paid property taxes. The property taxes in this State are among the highest in the nation and the whole New Jersey tax structure relies heavily thereon. Non-resident commuters do not ordinarily pay property taxes and so have not contributed substantially to State revenues, yet they do partake of benefits offered to alleviate the transportation problem. Furthermore, non-residents enjoy other benefits, services and protections provided by the State of New Jersey. The Court finds that the transportation problem is substantial and the ultimate impact of the tax upon residents and non-residents bears a close relation to the challenge of correcting the traffic and commuting problems.

The equal protection clause does not require that all persons be treated equally under the law at all times. The essence of the constitutional guarantee is simply that whatever classifications are made be reasonable. Surely the classification bears a reasonable relation to a proper governmental purpose. No more than this is required. The State need not demonstrate a compelling state interest. In economic matters (including taxation) the test has remained whether the statute is rationally related to a proper governmental purpose. This Court has found a proper governmental purpose. Broad discretion is vested in the Legislature in matters of taxation. *Austin* v. *New Hampshire,* 420 U.S. at 662. While a somewhat more stringent test was applied in *Austin* in determining whether the statute violated the privileges and immunities clause (which has here been met), it is not at all clear that the Supreme Court would have employed a strict scrutiny analysis under the equal protection challenge had

the court in *Austin* squarely determined the equal protection question. This Court declines to do so.

In addition, and perhaps most importantly, are the attitude and actions of the two sovereign states involved in this litigation, directly or indirectly, who are and will be affected by the decision herein. In the 1962 Act and thereafter, these two sovereign states by compact, by arrangement, by agreement, by attitude and by legislation set up an arrangement whereby they agreed on a taxing method which would govern commuters.[1] New York accepted the 1961 legislation and what developed later. It arranged for certain credits to be given residents of both New York and New Jersey. New York saw to it that its residents did not pay anything extra by virtue of their working in New Jersey. New Jersey took the same attitude.

But what if these distinctions did not exist between the situation here and the situation as it was before the court in *Austin?* The end result would be the same for there is no question in this Court's mind that the 1962 accord between the two states and the actions and inactions of the parties thereafter through 1975 represented a reciprocal understanding, compact or the like between the legislative and executive branches of these two states. *Austin* did not contemplate such a compact. It boggles the mind to consider a situation where two states could not make adjustments between them and pass reciprocal-type legislation (which would allow either to pass tax laws) whereby the citizens of two states wer not financially effected. Surely this was not what *Austin* had in mind.

---

[1] This Court's finding that there was an "accord" between New York and New Jersey is not inconsistent with the recent holding of the Supreme Court in *United States Steel* v. *Multistate Tax Commission,* U.S. , 98 S.Ct. 799 (1978).

Appendix B

As the United States Supreme Court was careful to state in a footnote in *Austin*:

> Neither *Travis* nor the present case should be taken in any way to denigrate the value of reciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a disadvantage upon non-residents, not reciprocally favorable treatment of non-residents by States that coordinate their tax laws. 420 U.S. 666, 1198 f. 12.

Even to date the New York Legislature has not sought to repeal the tax credit extended to its residents for taxes paid to New Jersey. To this date the New Jersey Legislature has adhered to New Jersey's essential obligations under the arrangement (starting in 1962) by continuing in effect the credit accorded its residents for taxes paid to New York. Neither governor has taken formal action to rescind the limited part of the accord not depedent on legislative action, nor have they even made a statement which would challenge the validity of the arrangement.

VI. Conclusion

The Act on its face is distinguishable from that before the Court in *Austin*. The specific purpose of the legislation is a valid one. The Act is constitutional. The question as to whether the Act is being unconstitutionally applied cannot be here determined. What can be said is that the Act contains the internal safeguards to protect the individual rights of New York commuters.

Judgment accordingly.

Very truly yours,

/s Sherwin D. Lester
J.S.C.

SDL:joc

Appendix B

To be Attached to and Made a Part of Judge Lester's Letter Opinion Dated October 24, 1978.

[Letterhead Omitted]

October 31, 1978

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Re: John Salorio, et al. v. Sidney Glaser, Director of the Division of Taxation, Dept. of the Treasury of the State of New Jersey.
Docket No. C-3628-76

Gentlemen:

The opinion letter of October 24, 1978 is hereby amended by inserting an asterisk (*) indicating a footnote after the word "statute" at the end of the last line of the first full paragraph on page 10 of the opinion and by adding a footnote as follows:

Appendix B

* N.J.S.A. 54:8A-22. Misapplication of funds; right to refund, reads in pertinent part:

> In the event that any part of the moneys in the Transportation Fund shall, at any time, be applied to a purpose or purposes other than one set forth in this act, every taxpayer who shall thereupon have been subject to the tax imposed by this act and who shall have paid the same, shall be entitled to a refund, or to a credit against taxes subsequently accruing, equal to his pro rata share of the amount so applied * * *.

Furthermore, N.J.S.A. 54:8A-57 calls for a suspension of the tax imposed by the Act in the event that funds are used for an improper purpose. The suspension must continue until the amounts to be refunded, as determined under section 22, have been allowed and paid.

Thus, the internal safeguards protecting the constitutional rights of individual taxpayers in the *application* of the statute appear on the face thereof. The administrative remedies afforded plaintiffs stand intact, untested and surely not exhausted. (END OF FOOTNOTE)

Very truly yours,

s/ SHERWIN D. LESTER
J.S.C.

SDL:joc

Appendix B

To be Attached to and Made a Part of Judge Lester's Letter Opinion Dated October 24, 1978.

[LETTERHEAD OMITTED]

November 8, 1978

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Re: Salorio v. Glaser
Docket No. C-3628-76

Gentlemen:

Reference is made to the letter opinion in this matter dated October 24, 1978.

The following errors were brought to my attention and corrections should be noted as follows:

1. At page 4 in the first full paragraph at line 6, the words "State Commissioner of *Taxation*"

should be changed to "State Commissioner of *Transportation.*"

2. At page 13 in the second full paragraph, the third full sentence should read: "During part of the time involved here New Jersey residents *were subject to* this tax." (emphasis indicates changes)

Very truly yours,

SHERWIN D. LESTER
J.S.C.

SDL:joc

APPENDIX C

New Jersey Emergency Transportation Tax (Commuter Income Tax), 54 N.J. Stat. Ann. §§ 8A-1 to 8A-57 (West) (Supp. 1979)

CHAPTER 8A. COMMUTERS INCOME TAX

[Article 1. Emergency Transportation Tax]

Sec.

54:8A-1. Short title.

54:8A-2. Imposition of tax; collection; payment; exemption.

54:8A-3. "Resident" defined.

54:8A-4. "Derived from sources within" defined.

54:8A-5. "Critical area state" defined; legislative findings; certification of state highway commissioner; publication.

54:8A-6. Rates; computation of tax upon entire net income.

54:8A-6.1 Minimum income tax on minimum taxable income of each individual.

54:8A-6.2 Minimum taxable income.

54:8A-6.3 Tax surcharge.

54:8A-6.4 Maximum tax rate on personal service income.

54:8A-7. Gross income defined; manner of computing.

54:8A-8. "Taxpayer" defined.

54:8A-9. Standard deduction.

54:8A-10. Exceptions from net income.

Appendix C

SEC.

54:8A-11. "Dependent" defined.

54:8A-12. "Related to taxpayer" defined.

54:8A-13. Dependent; claim by person contributing more than ten per cent of support.

54:8A-14. "Eligibility year" defined.

54:8A-15. Repealed.

54:8A-15.1 Household, and household and dependent care services necessary for gainful employment credits.

54:8A-16. Credits for tax imposed by another critical area state.

54:8A-17. Withholding tax.

54:8A-18. Payment of tax; returns; extension of time.

54:8A-19. Assignment of claim for refund of money paid or withheld in other jurisdiction.

54:8A-20. Transportation fund; purposes; authorization to use.

54:8A-21. Endowment fund; investment; use.

54:8A-22. Misapplication of funds; right to refund.

54:8A-23. "Source state" defined.

54:8A-24 to 54:8A-28. Repealed.

54:8A-29. Taxable year; annual accounting period; calendar year; fiscal year; definitions.

54:8A-30. "Partnership" defined.

54:8A-31. Partnership liability; inclusions in gross income.

Appendix C

SEC.

54:8A-32. Computation of gross income of taxpayer.

54:8A-33. Income derived from sources within taxpayer's source state; exclusions from gross income.

54:8A-34. "Net income" defined.

54:8A-35. Computation of net income; deductions.

54:8A-36. Computation of gross income from federal adjusted gross income figure.

54:8A-37. Additional deductions.

54:8A-37.1 Deductions for allocable expense attributable to items of tax preference.

54:8A-38. Inventories.

54:8A-39. Net capital gain or loss; computation; deductions.

54:8A-40. Items not deductable.

54:8A-41. "Capital assets" defined.

54:8A-42. Basis of property; gain or loss from sale or other disposition of property.

54:8A-43. Agreements with taxpayer relating to liability.

54:8A-44. Persons required to file.

54:8A-45. Repealed.

54:8A-46. Actions for collection of tax.

54:8A-47. Payment of tax; signing of documents; certification of statements.

54:8A-48. Taxable year; method of accounting.

Appendix C

SEC.

54:8A-49. Withholding return.

54:8A-50. Liability of employer required to withhold tax; special fund; right of action against employer.

54:8A-51. Failure of employer to deduct and withhold tax or to pay tax withheld.

54:8A-52. Reciprocity credit; relief from withholding.

54:8A-53. Delinquent return or taxes; penalties; interest; abatement or remission.

54:8A-54. Applicability of state tax uniform procedure law.

54:8A-55. Administration; determination of amount of tax due.

54:8A-56. Exercise of powers and duties of Division of Taxation by director.

54:8A-57. Effective date; suspension of tax.

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[ARTICLE 1, EMERGENCY TRANSPORTATION TAX]

* * *

54:8A-1. Short title

This act shall be known and referred to by its short title, the "emergency transportation tax act." L.1961, c. 32, p. 126, § 1.

Appendix C

54:8A-2. Imposition of tax; levy; collection; payment; exemption

A temporary emergency tax is hereby imposed, and shall be levied, collected and paid annually, at the rates specified in this act;

(a) Upon every resident of this State, who is not a resident of another critical area state under and pursuant to its laws, upon and with respect to the entire state under and pursuant to its laws, upon and with respect to the entire net income as defined in this act and subject to taxation under this act, for the taxable year, derived from sources within a critical area state other than New Jersey; and

(b) Upon and with respect to the entire net income as defined in this act and subject to taxation under this act, for the taxable year, derived from sources within this State by natural persons who are not residents of this State and who are residents of another critical area state under and pursuant to the law of such state.

(c) Notwithstanding the foregoing, for taxable years beginning on or after January 1, 1972 no tax shall be payable under section 6(c) (C. 54:8A-6(e)) by:

(1) Any person individual whose entire gross income for the taxable year is $2,500.00 or less, provided such individual is not married nor the head of a household nor a surviving spouse;

(2) Any head of a household or surviving spouse whose entire gross income for the taxable year is $5,000.00 or less; and

(3) Any husband or wife whose entire gross income for the taxable year, determined jointly, is $5,000.00 or

less, or the aggregate of whose gross income for the taxable year, determined separately, is $5,000.00 or less.

L.1961, c. 32, p. 126, § 2. Amended by L.1961, c. 129, p. 755, § 1, eff. Dec. 22, 1961; L.1970, c. 304, § 1; L.1972, c. 12, § 1; L.1973, c. 244, § 1, eff. Nov. 21, 1973.

54:8A-3. "Resident" defined

The word "resident" applies only to natural persons and includes any person domiciled in the State, except a person who, though domiciled in the State, maintains no permanent place of abode within the State, but does maintain a permanent place of abode without the State, and who spends in the aggregate not to exceed 30 days of the taxable year within the State. In addition, it includes any person who maintains a permanent place of abode within the State and spends in the aggregate more than 183 days of the taxable year within the State, whether or not domiciled in the State during any portion of said period, and such a person shall be taxed the same as though he had been domiciled in the State during the entire taxable year. However, it does not include a person in the Armed Forces of the United States, whether in a land, sea or air service or any auxiliary corps or guard thereof, during any period when individuals are liable for induction for training and service under applicable law, if not domiciled in the State notwithstanding his maintenance of a permanent place of abode within the State and his spending an aggregate of more than 183 days in the State.

L.1961, c. 32, p. 126, § 3, as amended L.1962, c. 70, §1.

Appendix C

54:8A-4. "Derived from sources within" defined

"Derived from sources within" 1 State or another, as applied to entire net income, means such income and gain from all property owned and from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, and from all business, trade, professional or occupation carried on, in the particular State. No person who is not a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, shall be deemed to carry on a business, trade, profession or occupation in a State solely by reason of the purchase and sale of property for his own account. L.1961, c. 32, p. 127, § 4, as amended L.1961, c. 129, p. 755, § 2.

54:8A-5. "Critical area state" defined; legislative findings; certification of state highway commissioner; publication

(a) "Critical area State" means this State and such other State bordering thereon within which there exists part of an area, another part of which is in this State, and within which area there is, as of January 1 of any year, a critical transportation problem in respect to the transportation of persons and property interstate.

(b) The Legislature finds and declares that a critical transportation problem exists in connection with transportation interstate between this State and another State bordering thereon when there is such number of daily commuters between said States as to create a severe peak-load demand requiring facilities and services, by any means or mode of transportation far in excess of those needed for normal travel outside of usual com-

muter hours, caused by the carrying on of activities in 1 of the States by persons residing in another, from which activities such persons derive income or gain from sources within the State other than that in which they reside. The Legislature further finds and declares that whenever the aggregate number of persons, residing in each of such States who are employed, or carry on a trade, business, occupation or profession in the other, exceeds 100,000, that fact reasonably indicates that a critical transportation problem exists.

(c) Within 40 days after the taking effect of this act, and within 40 days after the first day of each year hereafter so long as this act shall remain in effect, the State Highway Commissioner shall certify to the State Treasurer his findings with respect to the existence of the conditions herein set forth and the identity of any States which he determines to come within the definition in this section. Upon receipt of such certification, the State Treasurer shall cause public notice thereof to be given, by publication in such newspaper or newspapers, and in such form, as he shall find will fairly apprise all persons subject to taxation under this act, of the making of said certification and of the significance thereof to such persons. Any certification so made shall be effective for the entire calendar year as of the first day of which it ascertains the facts. L.1961, c. 32, p. 127, § 5.

54:8A-6. Rates; computation of tax upon entire net income

(a) (Deleted by amendment.) P.L.1972, c. 12.

(b) For taxable years ending after December 31, 1971 through and including those ending in 1977, the tax imposed by this act upon entire net income shall be computed at the following rates:

Appendix C

On such of the amount as exceeds	But does not exceed	The tax is
$0	$1,000	2%
1,000	3,000	$20 plus 3% of excess over $1,000
3,000	5,000	80 plus 4% of excess over 3,000
5,000	7,000	160 plus 5% of excess over 5,000
7,000	9,000	260 plus 6% of excess over 7,000
9,000	11,000	380 plus 7% of excess over 9,000
11,000	13,000	520 plus 8% of excess over 11,000
13,000	15,000	680 plus 9% of excess over 13,000
15,000	17,000	860 plus 10% of excess over 15,000
17,000	19,000	1,060 plus 11% of excess over 17,000
19,000	21,000	1,280 plus 12% of excess over 19,000
21,000	23,000	1,520 plus 13% of excess over 21,000
23,000	25,000	1,780 plus 14% of excess over 23,000
25,000		2,060 plus 15% of excess over 25,000

(c)(1) For taxable years ending after December 31, 1977 through and including those ending in 1978, the tax imposed by this act upon entire net income shall be computed at the following rates:

Appendix C

On such of the amount as exceeds	But does not exceed	The tax is
$0	$1,000	2%
1,000	3,000	$20 plus 3% of excess over $1,000
3,000	5,000	80 plus 4% of excess over 3,000
5,000	7,000	160 plus 5% of excess over 5,000
7,000	9,000	260 plus 6% of excess over 7,000
9,000	11,000	380 plus 7% of excess over 9,000
11,000	13,000	520 plus 8% of excess over 11,000
13,000	15,000	680 plus 9% of excess over 13,000
15,000	17,000	860 plus 10% of excess over 15,000
17,000	19,000	1,060 plus 11% of excess over 17,000
19,000	21,000	1,280 plus 12% of excess over 19,000
21,000	23,000	1,520 plus 13% of excess over 21,000
23,000	30,000	1,780 plus 14% of excess over 23,000
30,000		2,760 plus 15% of excess over 30,000

(2) For taxable years ending after December 31, 1978, the tax imposed by this act upon entire net income shall be computed at the following rates:

Appendix C

On such of the amount as exceeds	But does not exceed	The tax is
$0	$1,000	2%
1,000	3,000	$20 plus 3% of excess over $1,000
3,000	5,000	80 plus 4% of excess over 3,000
5,000	7,000	160 plus 5% of excess over 5,000
7,000	9,000	260 plus 6% of excess over 7,000
9,000	11,000	380 plus 7% of excess over 9,000
11,000	13,000	520 plus 8% of excess over 11,000
13,000	15,000	680 plus 9% of excess over 13,000
15,000	17,000	860 plus 10% of excess over 15,000
17,000	19,000	1,060 plus 11% of excess over 17,000
19,000	21,000	1,280 plus 12% of excess over 19,000
21,000	23,000	1,520 plus 13% of excess over 21,000
23,000		1,780 plus 14% of excess over 23,000

(d)(1) For each taxable year beginning in 1977 and ending in 1978 two tentative taxes shall be computed, the first as provided in subsection (b) and the second as provided in subsection (c)(1), and the tax for such year shall be the sum of that portion of each tentative tax

which the number of days in 1977 and the number of days in 1978, respectively, bears to the number of days in the entire taxable year.

(2) For each taxable year beginning in 1978 and ending in 1979 two tentative taxes shall be computed, the first as provided in subsection (c)(1) and the second as provided in subsection (c)(2), and the tax for such year shall be the sum of that proportion of each tentative tax which the number of days in 1978 and the number of days in 1979, respectively, bears to the number of days in the entire taxable year.

(e) For taxable years beginning on or after January 1, 1972, the tax imposed by section 9 of P.L.1970, c. 304 (C. 54:8A-6.1) on minimum taxable income, as defined in section 10 of P.L.1970, c. 304 (C. 54:8A-6.2) shall be at the rate of 6%.

L.1961, c. 32, p. 128, § 6. Amended by L.1968, c. 59 § 1, eff. June 11, 1968; L.1970, c. 304, § 2; L.1972, c. 12, § 2; L.1978, c. 131 § 1, eff. Oct. 18, 1978.

54:8-6.1. Minimum income tax on minimum taxable income of each individual

In addition to the tax imposed under section 2 (C. 54:8A-2), a minimum income tax determined in accordance with the rate set forth in subsection (e) of section 6 (C. 54:8A-6) is hereby imposed for each taxable year on the minimum taxable income of every individual.

L.1970, c. 304, § 9 supplementing P.L.1961, c. 32. Amended by L.1973, c. 244, § 3; e.: Nov. 21, 1973.

Appendix C

54:8A-6.2. Minimum taxable income

(a) The minimum taxable income shall be the sum of the items of tax preference, as described in subsection (b) of this section, reduced (but not below zero) by the aggregate of the following:

(1) The applicable specific deduction described in subsection (c) of this section;

(2) The tax determined under subsecetion (b) or (c) of section 6 of P.L.1961, c. 32 (C. 54:AA-6), as may apply, for the taxable year, reduced by the sum of the credits allowable under section 7 of this amendatory and supplementary act; and

(3) To the extent that the sum of the items of tax preference exceeds the applicable specific deduction described in subsection (c.) of this section plus the tax described in paragraph 2 above, the amount of any net operating loss of the taxpayer, determined as provided in subsection (b)(5) of section 35 (C. 54:8A-35), which remains as a net operating loss carryover to a succeeding taxable year. In such case, however, the amount of such net operating loss used to reduce the sum of the items of tax preference shall be treated as an item of tax preference in the next succeeding taxable years, in order of time, to the extent that such net operating loss carryover reduces taxable income.

(b) For purposes of this act, the term "items of tax preference" shall mean the Federal items of tax preference, as defined in the laws of the United States, derived from or connected with New Jersey sources, for the taxable year, with the modifications as may be prescribed by regulations of the Division of Taxation which relate to income derived from or connected with New Jersey sources.

Appendix C

(1) The Federal items of tax preference for amortization of certified pollution control facilities shall be excluded from the computation of items of tax preference with respect to industrial waste treatment facilities and air pollution control facilities which qualify.

(2) The Federal items of tax preference with respect to depletion shall be excluded from the computation of items of tax preference.

(3) The Federal item of tax preference for capital gains shall be computed by subtracting from such tax preference item one-fifth of the net long-term capital gain deduction.

(c) Specific deduction. An amount which bears the same ratio to $5,000.00, or $2,500.00 in the case of a married individual filing a separate return, as his items of tax preference computed under subsection (b) of this section bear to his total Federal items of tax preference.

(d) (Deleted by amendment.) P.L.1972, c. 12, section 3. L.1970, c. 304, § 10, supplementing P.L.1961, c. 32. Amended by L.1972, c. 12, § 3; L.1973, c. 244, § 4, eff. Nov. 21, 1973; L.1978, c. 131, § 4, eff. Oct. 18, 1978.

54:8A-6.3. Tax surcharge

(a) In addition to the taxes imposed by sections 6(c) (C. 54:8A-6(c)) and 6(e) (C. 54:8A-6(e)), there is hereby imposed on the income of every taxpayer for the taxable years ending after December 31, 1971 and commencing on or before December 31, 1976 a tax at the rate of 2½% of the taxes imposed under sections 6(c) (C. 54:8A-6(c)) and 6(e) (C. 54:8A-6(e)) before the deduction of any credits against tax allowable for such year except with re-

spect to the tax credit allowed under section 16 (C. 54: 8A-16).

(b) Provided, however, that for each taxable year beginning in 1971 and ending in 1972, a tentative tax shall be computed as provided in subsection (a) except that the tax imposed under section 2 (C. 54:2A-2) shall be computed in accordance with the rates set forth in subsection 6(c) thereof; the additional tax imposed under this section for such year shall be that proportion of such tentative tax as the number of days in 1972 bears to the number of days in the entire taxable year.

(c) Provided further that for each taxable year beginning in 1976 and ending in 1977, a tentative tax shall be computed as provided in subsection (a) hereof and the additional tax imposed under this section for such year shall be that proportion of such tentative tax as the number of days in 1976 bears to the number of days in the entire taxable year.

(d) Notwithstanding the provisions of subsection (a) of this section, the tax imposed by such subsection shall not apply for taxable year ending after December 31, 1972 and commencing before January 1, 1975, provided further that for each taxable year beginning in 1972 and ending in 1973, a tentative tax shall be computed as provided in subsection (a) and the additional tax imposed under this section for such year shall be that proportion of such tentative tax as the number of days in 1972 bears to the number of days in the entire taxable year. Provided further that for each taxable year beginning in 1974 and ending in 1975, a tentative tax shall be computed as provided in subsection (a) and the additional tax imposed under this section for such year shall be that proportion of such tentative tax as the number of days in 1975 bears to the number of days in the entire taxable year.

L.1972, c. 12, § 9. Amended by L.1973, c. 244, § 5, eff. Nov. 21, 1973. L.1974, c. 187, § 1, eff. Dec. 24, 1974.

Appendix C

54:8A-6.4. Maximum tax rate on personal service income

(a) If for any taxable year beginning in 1978 and thereafter an individual has personal service entire net income which exceeds the amount of entire net income specified in paragraph (1) of this subsection, the tax determined pursuant to subsection 6(c) of P.L.1961, c. 32 (C. 54:8A-6(c)) for such year shall be the sum of:

(1) The tax determined by subsection 6(c) of P.L.1961, c. 32 (C. 54:8A-6(c)) on the highest amount of entire net income on which the rate of tax does not exceed 12%,

(2) 12% of the amount by which his personal service entire net income exceeds the amount of entire net income specified in paragraph (1) of this subsection, and

(3) The excess of the tax determined under section 6(c) of P.L.1961, c. 32 (C. 54:8A-6(c)), without regard to this section, over the tax so determined with reference solely to his personal service entire net income.

(b) For purposes of this section the term "Personal Service Income" means items of income includible as personal service income for purposes of section 1348 of the Internal Revenue Code; provided, however, that notwithstanding the provisions of such section of the Internal Revenue Code to the contrary with respect to the filing of returns by married individuals, the provisions of this section of this act shall be applicable in the case of a husband and wife who file separate New Jersey tax returns (whether or not on a single form).

(c) The personal service entire net income of an individual is the excess of:

(1) The amount which bears the same ratio (but not in excess of 100%) to his entire net income as his personal

service gross income bears to his entire gross income, over

(2) The sum of his items of tax preference, as defined in this act, for the taxable year.

For purposes of paragraph (1) of this subsection, the term "personal service gross income" means personal service income reduced by any deductions allowable under section 62 of the Internal Revenue Code which are properly allocable to or chargeable against such personal service income.

L.1978, c. 131, § 6, eff. Oct. 18, 1978.

54:8A-7. Gross income defined; manner of computing

The term "gross income" means the total of a taxpayer's gains, losses, profits and income derived from sources within his source State. Gross income shall be computed in accordance with the provisions of section 32 or section 36 of this act. In computing gross income, the items of gain, loss, profit or income set forth in section 33 of this act shall not be included except to the extent provided therein.

For the purpose of applying the deductions permitted in sections 9 and 37 of this act, gross income computed in accordance with the provisions of section 32 of this act shall be reduced by the amount of the deduction allowed in section 35(a) of this act. L.1961, c. 32, p. 129, § 7, as amended L.1961, c. 129, p. 756, § 3.

54:8A-8. "Taxpayer" defined

"Taxpayer" means any person subject to a tax imposed by this act, or whose income is in whole or in part subject

to a tax imposed by this act, and does not include corporations. L.1961, c. 32, p. 129, § 8, as amended L.1962, c. 70, § 2.

54:8A-9. Standard deduction

(a) Any taxpayer may elect to deduct 10% of his gross income, or $1,000.00, whichever is less, in lieu of all deductions otherwise permitted under this act. The deduction provided for by this section shall become known as the "standard deduction."

For taxable years beginning in 1971, the standard deduction shall be 13% of gross income or $1,500.00, whichever is less, for taxable years beginning in 1972, the standard deduction shall be 14% or $2,000.00, whichever is less; for taxable years beginning in 1973 the standard deduction shall be 15% or $2,000.00, whichever is less; and for taxable years beginning in 1978 and thereafter the standard deduction shall be 16% or $2,400.00, whichever is less.

A husband and wife shall not be entitled to a standard deduction in an amount greater than one computed on their aggregate gross income, whether they file separate or joint returns. If they file separate returns, neither may elect the standard deduction unless the other also so elects. If both so elect, either may take such deduction, or they may divide it; except that for taxable years beginning in 1971 the standard deductions shall be 13% of gross income or $1,500.00, whichever is less: for taxable years beginning in 1972 the standard deduction shall be 14% or $2,000.00, whichever is less; for taxable years beginning in 1973 the standard deduction shall be 15% or $2,000.00, whichever is less; and for taxable years

beginning in 1978 and thereafter the standard deduction shall be 16% or $2,400.00, whichever is less.

Such election may be changed for a taxable year after the filing of the return, subject to regulations issued under this act. If a taxpayer wishing to make such change has a spouse who filed a separate return, the change shall not be allowed unless (1) such spouse also makes a change consistent with the change desired by the taxpayer and (2) both consent in writing to the assessment of any additional tax resulting from such change without regard to time limits otherwise preventing such assessment.

(b) Minimum New Jersey standard deduction. For taxable years beginning in 1978 and thereafter:

(1) The New Jersey standard deduction of an individual who is not married nor the head of the household nor a surviving spouse shall be the amount determined under subsection (a) of this section or $1,400.00, whichever is greater;

(2) The New Jersey standard deduction of a husband and wife whose New Jersey taxable income is determined jointly, or of the head of a household, or of a surviving spouse, shall be the amount determined under subsection (a) of this section or $1,900.00, whichever is greater; and

(3) The aggregate New Jersey standard deductions of a husband and wife whose New Jersey taxable incomes are determined separately shall be the amount determined under subsection (a) of this section or $1,900.00, whichever is greater, and such standard deductions may be taken by either or divided between them as they may elect.

L.1961, c. 32, p. 129, § 9. Amended by L.1961, c. 129, p. 756, § 4; L.1962, c. 70, § 3; L.1970, c. 304, § 3; L.1972, c. 12, § 4; L.1978, c. 131, § 2, eff. Oct. 18, 1978.

54:8A-10. Exemptions from net income

(a) Each taxpayer is allowed the following exemptions with respect to net income:

For each taxpayer, $650.00; for the taxpayer's spouse, if taxpayer does not file a joint return and if such spouse has no gross income for the eligibility year and is not a dependent of another taxpayer, an additional $650.00; for each taxpayer who is at least 65 years of age or over at the close of his taxable year, an additional $650.00, and for taxpayer's spouse under the same conditions and if the initial $650.00 exemption is allowable, an additional $650.00; for each taxpayer who is blind at the close of his taxable year, an additional $650.00, and for taxpayer's spouse under the same conditions and if the initial $650.00 exemption is allowable, an additional $650.00. Blindness shall be deemed to exist when central visual acuity in the better eye does not exceed 20/200 with correcting lenses, or when the widest diameter of the visual field subtends an angle of not more than 20 degrees;

For each dependent whose entire gross income for the eligibility year is less than $750.00, or who is taxpayer's child or stepchild and has not attained age 19 at the close of the eligibility year or is a student: $650.00.

For taxable years beginning in 1979, such exemption shall be $700.00, and for taxable years beginning in 1980 and thereafter such exemption shall be $750.00.

Appendix C

With respect to all taxable years beginning on or after January 1, 1973, if (1) the taxpayer's gross income as defined in section 7 of P.L.1961, c. 32 (C. 54:8A-7), is exceeded by (2) his entire gross income by more than $100.00, his exemptions allowed in this section shall be limited by the percentage which (1) is of (2). The manner for determining a taxpayer's entire gross income shall be provided by regulation. Such regulations may authorize the use of Federal adjusted gross income for this purpose.

(b) Husband and wife. For a husband and wife who have elected to file separate New Jersey returns on a single form pursuant to section 44(b) of P.L.1961, c. 32 (C. 54:8A-44(b)), the limitation under subsection (a) of this section shall be determined by reference to (1) their total New Jersey gross incomes and (2) the combined entire gross income of the husband and wife.
L.1961, c. 32, p. 130, § 10. Amended by L.1961, c. 129, p. 757, § 5; L.1970, c. 304, § 4; L.1973, c. 244, § 2, eff. Nov. 21, 1973; L.1978, c. 131, § 3, eff. Oct. 18, 1978.

54:8A-11. "Dependent" defined

"Dependent" means any individual related to taxpayer, over half of whose support (exclusive of any amount received by a child or stepchild as a scholarship for study at an educational institution) for the eligibility year was received from the taxpayer, in fact or constructively. No person may be claimed as a dependent by any taxpayer if such person has filed a joint return with his or her spouse. L.1961, c. 32, p. 131, § 11, as amended L.1961, c. 129, p. 757, § 6.

Appendix C

54:8A-12. "Related to taxpayer" defined

"Related to taxpayer" means related by blood, to the extent of any lineal descendant or ancestor of taxpayer, other children or grandchildren of a parent of taxpayer, children of a grandparent of taxpayer, and grandchildren of a grandparent of taxpayer who are receiving institutional care for physical or mental disability and who had been members of taxpayer's household prior to institutionalization; or related by marriage, to the extent of a stepchild, stepparent, stepbrother or stepsister of taxpayer, the parents, brother or sister of the spouse of the taxpayer, or the spouse of a child of taxpayer; or related by household, to the extent of a person having taxpayer's home as his principal place of abode and being a member of taxpayer's household for the taxable year. Brothers and sisters of the half blood shall be regarded as though of the whole blood. L.1961, c. 32, p. 131, § 12, as amended L.1961, c. 129, p. 758, § 7.

54:8A-13. Dependent; claim by person contributing more than ten per cent of support

An individual receiving over half of his support for the eligibility year from persons who would be entitled to claim him as a dependent except that no one of them contributed over half of such support, may be claimed as a dependent by any one of such persons who contributed over 10% of such support, provided that all other such persons execute written declaration, to be filed with the return of the person making the claim, not to claim the same dependent for the eligibility year of each of them. L.1961, c. 32, p. 131, § 13.

Appendix C

54:8A-14. "Eligibility year" defined

"Eligibility year" means the calendar year in which the taxable year of the taxpayer begins. L.1961, c. 32, p. 131, § 14.

54:8A-15. Repealed by L.1972, c. 12 § 10

54:8A-15.1 Household, and household and dependent care services necessary for gainful employment credits

a. Household credit.

(1) For taxable years beginning on and after January 1, 1978, a credit shall be allowed against the tax imposed by subsection 6(c) of P.L.1961, c. 32 (C. 54:8A-6(c)). The credit, computed as described in paragraph (2) of this subsection, shall not exceed the tax imposed by subsection 6(c) of P.L.1961, c. 32 (C. 54:8A-6(c)) for the taxable year, reduced by the credits permitted under subsection (b) of this section and section 16 P.L.1961, c. 32 (C. 54:8A-16).

(2) The amount of the credit allowed pursuant to this subsection shall be determined in accordance with the following table:

If the household gross income is	The credit shall be
Less than $5,000.00	$65.00
$5,000.00 but less than $6,000.00	$50.00
$6,000.00 but less than $7,000.00	$40.00
$7,000.00 but less than $25,000.00	$35.00

Appendix C

(3) For the purposes of this subsection:

(A) "Household gross income" shall mean the aggregate entire gross income of a household, as the term household is defined in subparagraph (B) of this paragraph, for the taxable year, plus the aggregate entire minimum taxable income of that household.

(B) "Household" means a husband and wife, a head of a household, a surviving spouse, or an individual who is not married nor the head of a household nor a surviving spouse nor a taxpayer with respect to whom a deduction under subsection (e) of section 151 of the Internal Revenue Code is allowable to another taxpayer for the taxable year.

(C) "Household gross income of a husband and wife" shall be the aggregate of their entire gross incomes for the taxable year plus the aggregate of their minimum taxable incomes irrespective of whether joint or separate tax returns are filed. Provided, however, that a husband or wife filing a separate New Jersey tax shall be permitted one-half of the credit otherwise allowed his or her household, except as limited by paragraph (1) of this subsection.

(D) "Household gross income" shall be computed in all cases to reflect the entire gross income from all sources of each member of the household for the entire taxable year.

(E) If a taxpayer changes his status during his taxable year from resident to nonresident, or from nonresident to resident, the household credit shall be prorated to reflect the period that the taxpayer

was subject to any tax under this act. In the case of a husband and wife, if either or both changes his or her status from resident to nonresident or from nonresident to resident and separate returns are filed, the credit computed for the entire year shall be divided first as provided in subparagraph (C) of this paragraph and then prorated according to each period that the taxpayer was subject to tax under this act.

b. Credit for certain household and dependent care service necessary for gainful employment.

(1) For taxable years beginning on and after January 1, 1977, a taxpayer shall be allowed credit, to be computed as hereinafter provided, against the tax imposed by subsection 6(b) or 6(c) of P.L.1961, c. 32 (C. 54:8A-6(b) or 6(c)) of this act. Except as provided below, the amount of the credit shall be 20% of the credit allowed such taxpayer pursuant to the provisions of section 44A of the Internal Revenue Code for the same taxable year. The amount of such credit shall not exceed the tax imposed by subsection 6(b) or 6(c) of P.L. 1961, c. 32 (C. 54:8A-6(b) or 6(c)(, as may apply, of this act, for the taxable year, reduced by the credit permitted under section 16 of P.L. 1961, c. 32 (C. 54:8A-16).

(2) In the case of a husband and wife who file a joint Federal return, but who elect to determine their New Jersey taxes separately, the credit allowed pursuant to this subsection may only be applied against the tax imposed on the spouse with the lower entire net income computed without regard to such credit.

(3) Any taxpayer who is otherwise eligible to take the credit permitted by this subsection shall be permitted to

take the full amount of such credit except that if (a) his gross income, as defined in section 7 of P.L.1961, c. 32 (C. 54:8A-7), is exceeded by (b) his entire gross income by more than $100.00, his credit shall be limited to the amount which represents the same percentage of the total allowable credit which (a) is of (b).

For a husband and wife whose Federal taxable income is determined on a joint return but whose New Jersey entire net incomes are determined separately on a single form, the limitation contained in this subparagraph shall be determined by reference to (a) the total of their gross incomes as defined in section 7 of P.L.1961, c. 32 (C. 54: 8A-7) and (b) the joint entire gross income they would be required to report if both were determining their tax on their joint entire gross income.

L.1978, c. 131, § 7, eff. Oct. 18, 1978.

54:8A-16. Credits for tax imposed by another critical area state

(A) (1) A nonresident of this State shall be allowed a credit against the tax otherwise due under this act for any income tax imposed for the taxable year by another critical area State, of which the taxpayer is a resident but such credit shall not exceed either:

(a) the percentage of the other tax determined by dividing the portion of the taxpayer's income subject to taxation under this act which is also subject to the other tax by the total amount of his income subject to such other tax, or

(b) the percentage of the tax otherwise due under this act, determined by dividing the portion of the taxpayer's

income subject to taxation under this act which is also subject to the other tax by the total amount of the taxpayer's income which is taxable under this act.

(2) No credit shall be allowed nder this section unless the jurisdiction of which the taxpayer is a resident:

(a) grants a substantially similar credit to residents of this State, or

(b) imposes an income tax on ~~its own residents~~ with respect to income derived from this State, and exempts from income tax the income of residents of this State.

(B) A resident of this State shall be allowed a credit against the tax otherwise due under this act for any income tax imposed for the taxable year by another critical area State, upon income both derived therefrom and subject to tax under this act.

(1) The credit allowable under this subsection shall not exceed the percentage otherwise due under this act determined by dividing the portion of the taxpayer's income subject to taxation by such other jurisdiction by the total amount of the taxpayer's income subject to taxation under this act.

(2) The credit allowable under this subsection shall not reduce the tax otherwise due under this act to an amount less than would have been due if the income subject to taxation by such other jurisdiction were excluded from the taxpayer's income subject to tax under this act.

(3) No credit shall be allowed under this subsection for a tax of a jurisdiction which allows residents of this State a credit against the taxes imposed by such other jurisdiction for the tax under this act, if such other credit is substantially similar to the credit granted to nonresident tax-

payers by subsection (A) of this section. L.1961, c. 32, p. 132, § 16, as amended L.1961, c. 129, p. 758, § 9; L.1962, c. 70, § 4.

54:8A-17. Withholding tax

From and after the first day of the first month following at least a full calendar month after the enactment of this act, every employer in this State of a taxpayer subject to tax in respect of wages, salaries or commissions derived from sources within this State shall deduct and withhold upon the same for each payroll period an amount computed in such manner as to result, as far as practicable, with due regard to the personal exemptions and standard deduction allowable under this act, in withholding during each calendar year a sum substantially equivalent to the amount of tax reasonably estimated to be due under this article. Methods for determining the amount to be withheld shall be prescribed by regulation, as shall procedures and requirements for the furnishing of written exemption certificates to the employer, the amending or substitution of the same, the furnishing by the employer of written statements showing the total compensation, the amount withheld and other specified information. L.1961, c. 32, p. 132, § 17.

54:8A-18. Payment of tax; returns; extension of time

With respect to each taxpayer, the tax imposed by this act shall be due and payable annually hereafter, in the manner provided in this section:

(a) Every taxpayer shall annually pay the tax imposed by this act with respect to all or any part of each of his

fiscal or calendar accounting years beginning after January 1, 1961, to be computed as in this act provided, for such fiscal or calendar accounting year or part thereof, on a return which shall be filed, in the case of a taxpayer reporting on a calendar year basis, on or before April 15 following the close of such calendar year, or, in the case of a taxpayer reporting on a fiscal year basis, on or before the fifteenth day of the fourth month following the close of such fiscal year, and the full amount of the tax shall be due and payable on or before the date prescribed herein for the filing of the return.

(b) Every taxpayer shall pay a like tax with respect to all or any part of the period beginning January 1, 1961 and extending through any subsequent part of its first fiscal or calendar accounting year ending after said date, to be computed as in this act provided, for such period, on a return which shall be filed on or before April 1, 1962, and the full amount of the tax shall be due and payable on or before the date prescribed herein for the filing of the return.

(c) Each return shall carry a certificate signed by the taxpayer to the effect that all statements contained therein are true, under the same penalties as for perjury committed. Blank forms of return shall be furnished on application, but failure to secure the form shall not relieve any taxpayer of the obligation of making any return herein required. Subject to regulations under this act and in such form as may be indicated thereby, taxpayers whose net income taxable under this act is or may be subject to tax under a similar law of another jurisdiction may be permitted to file a simple, short form return attached to a copy of his return as filed or about to be filed by him in such other jurisdiction.

Appendix C

Subject to regulations under this act, reasonable extensions of time for good cause shown, may be granted for not more than 6 months unless exceptional circumstances justify a longer period, within which returns may be filed.

In addition, persons in active service with the Armed Forces of the United States, who may be prevented by distance or injury or hospitalization arising out of such service, may be allowed such extension of time for the filing of returns, without interest or penalty, as may be fixed by regulations under this act. L.1961, c. 32, p. 133, § 18, as amended L.1961, c. 129, p. 759, § 10; L.1962, c. 70, § 5.

54:8A-19. Assignment of claim for refund of money paid or withheld in other jurisdiction

(a) Every resident of this State who is subject to tax in some other jurisdiction for income and gains derived from sources within such other jurisdiction, which jurisdiction grants to residents of this State a credit substantially similar to that allowed to non-residents of this State by section 16(A) of this act, and who is subject to tax under this act and who has made payment on the estimated amount of such tax, or who has, in such jurisdiction, been subject to deduction and withholding of money, otherwise payable to him, for the purpose of crediting the same to the payment of such tax, shall be entitled to satisfy his obligation to pay the tax due under this act by entering into an agreement with the division, in such form and containing such provisions as may be fixed by regulation, which shall constitute an assignment and transfer to the State of New Jersey of the chose

in action consisting of his claim for refund of moneys so paid or deducted and withheld, as well as an agreement to pay to the division so much of any refund as may be received by him as equals the tax under this act, within such period, to be not longer than 1 month after receipt by him of any such refund, as may be fixed by regulation; and for said purposes shall execute, deliver and file such document or documents, in such form, in such place or places and at such times as may be provided by regulation; and upon the making of any such assignment the State of New Jersey shall thereupon become the owner and holder of any such claims and shall be entitled to assert the same in its own right and as its own property, whether it asserts the same in its own name or in the name of the assigning taxpayers or otherwise.

In the event that the amount so paid or deducted and withheld, and received by the State of New Jersey pursuant to such agreement, shall exceed the amount necessary to satisfy the obligation of taxpayer under this act, the excess shall be repaid to taxpayer upon application therefor in accordance with procedures and forms fixed by regulation.

Every taxpayer exercising any option under this subsection shall be obliged to cooperate fully in any proceedings which may be taken for recovery of the claim for refund, and for that purpose shall execute and deliver such papers, affidavits, forms or other documents, shall appear and be available to give testimony at such place or places and at such time or times, shall furnish such information, shall permit the institution of such proceeding or proceedings in his name or otherwise, but at the sole cost and expense of the State, and do all other things,

as the division shall deem appropriate or desirable for the effective recovery of any sum due and payable on such claim.

The provisions of this subsection shall not apply to any tax, or to any payment or deduction and withholding for the satisfaction of the same, imposed by any Federal law.

(b) If it shall appear to the satisfaction of the division, based upon an opinion of the Attorney General of this State, that any residents of this State, or class of residents of this State who are subject to the tax imposed by this act, are liable for tax upon the same income under the law imposed for the taxable year by another critical area State and are thereby entitled to the credit allowed by section 16(B) of this act against the tax otherwise due under this act and that said credit is substantially sufficient to offset the taxes imposed hereunder, the division may by regulation relieve such residents or class of residents from being required to make any return under this act. L.1961, c. 32, p. 134, § 19, as amended L.1962, c. 70, § 6.

54:8A-20. Transportation fund; purposes; authorization to use

(a) All moneys which shall be received by way of tax or by way of moneys deducted and withheld under this act, shall be kept in a special fund, to be known as the Transportation Fund, separate and apart from all other funds, and the moneys in such fund at any time shall be used only for 1 or more of the following purposes, within the limits of available appropriations made by law from time to time:

(1) to meet the expenses of administering the provisions of this act and of the regulations made hereunder and the expenses of any proceedings or actions involving the same;

(2) to defray the cost of, or to provide financing by way of advances, loans or otherwise for, projects and programs to meet transportation problems, whether such transportation be by motor vehicle, by rail or rapid transit, or by any other mode or vehicle of transportation whatever, when such project or program includes the transportation of persons or property interstate, between the State of New Jersey and the source State, from which States taxpayers derive income or gain subject to tax under this act, and for the furnishing of such other facilities, services or other benefits for which the class of taxpayers covered by this act will be the major eligible recipient and for which the tax imposed by this act may reasonably be exacted, as may be authorized by law from time to time;

(3) to make payment of refunds to taxpayers entitled to receive the same;

(4) to make payment to another State of moneys deducted and withheld from its residents subject to tax hereunder in lieu of and in satisfaction of credits to which such residents may be entitled under the reciprocity clause contained in this act, whenever such State provides by or pursuant to its law.

(b) Funds in the Transportation Fund may not be used for any purpose except upon:

(1) presentation to the Attorney General of an itemization of the purposes for which funds are proposed to be used, stating the amount of each such proposed expenditure, which presentation shall be made by:

(A) The Director of the Division of Taxation, in the case of any purpose other than those described in subsection (a)(2) hereof, or

(B) The State Highway Commissioner in the case of any purpose described in said subsection (a)(2), and upon,

(2) transmittal of such itemization by the Attorney General to the State Treasurer, with a certification by the Attorney General endorsed thereon that the purposes for which funds are therein proposed to be used are within the terms and intent of the act and are otherwise in compliance with law. L.1961, c. 32, p. 135, § 20, as amended L.1961, c. 129, p. 761, § 11

54:8A-21. Endowment fund; investment; use

So much of the moneys as may be in the Transportation Fund at any time and as may be in excess of the amounts needed to meet anticipated uses thereof pursuant to this act during any fiscal year, shall be held and accumulated as an endowment fund, and may be invested and reinvested from time to time in the same manner as any State funds may be invested, and the income thereof, as well as so much of the principal as may be necessary from time to time, shall be applied to the purposes authorized for the said Transportation Fund, within the limits of available appropriations. L.1961, c. 32, p. 136, § 21.

54:8A-22. Misapplication of funds; right to refund

In the event that any part of the moneys in the Transportation Fund shall, at any time, be applied to a purpose

or purposes other than one set forth in this act, every taxpayer who shall have been subject to the tax imposed by this act and who shall have paid the same, shall thereupon be entitled to a refund, or to a credit against taxes subsequently accruing, equal to his pro rata share of the amount so applied, disregarding any amounts less than $1.00. Upon application made within 1 year after it shall be determined that any such moneys have been so applied, in such form and by such procedure as may be provided by regulation, the division shall determine the pro rata share of each taxpayer according to the following formula: (a) multiply the total amount of taxes paid by the taxpayer for all taxable years from the enactment hereof to July 1 of the year in which the right to refund arises under this section, by the dollar amount of the moneys determined to have been applied to a purpose other than one set forth in this act; then (b) divide the product by the total amount paid by all taxpayers during the same period; then (c) from the quotient strike off any amount less than $1.00 to obtain the sum to be refunded or credited. If the amount so applied to another purpose shall have been determined by a court of competent jurisdiction, the amount so determined shall be used in the computation otherwise, the division shall make determination of the amount. L. 1961, c. 32, p. 136, § 22.

54:8A-23. "Source state" defined

"Source State" means, in the case of residents of this State, a critical area State other than the State of New Jersey; and in the case of non-residents of this State who are residents of another critical area State, the term means the State of New Jersey. L.1961, c. 32, p. 137, § 23.

Appendix C

54:8A-24 to 54:8A-28. Repealed. L.1962, c. 70, § 12. Eff. June 5, 1962

54:8A-29. Taxable year; annual accounting period; calendar year; fiscal year; definitions

(a) The term "taxable year" means

(1) the taxpayer's annual accounting period, if it is a calendar year or a fiscal year;

(2) the calendar year,

(A) if the taxpayer keeps no books, or

(B) the taxpayer does not have an annual accounting period, or,

(C) the taxpayer has an annual accounting period, but such period does not qualify as a fiscal year; or

(3) the period for which the return is made, if the return is made for a period of less than 12 months.

(b) The term "annual accounting period" means the annual period on the basis of which the taxpayer regularly computes his income in keeping his books.

(c) The term "calendar year" means a period of 12 months ending on December 31.

(d) The term "fiscal year" means a period of 12 months ending on the last day of any month other than December. L.1961, c. 32, p. 140, § 29, as amended L.1961, c. 129, p. 771, § 17.

Appendix C

54:8A-30. "Partnership" defined

"Partnership" includes all forms of unincorporated organization other than an estate or trust or a corporation, through or by means of which any business, financial operation or venture is carried on or liquidated. L.1961, c. 32, p. 140, § 30.

54:8A-31. Partnership liability; inclusions in gross income

(a) Individuals carrying on business in partnerships shall be liable for tax under this act only in their individual capacity. Each partner shall include in his gross income his distributive share, whether distributed or not, of the partnership's net income and net loss for the taxable year, or, where his taxable year is different, then for the taxable year of the partner in which ends the taxable year of the partnership.

(b) If a partner shall compute his gross income in accordance with section 32 of this act, he shall be entitled to take the deductions set forth in section 35(a) of the act. If such a partner's entire interest is sold, exchanged or liquidated, his distributive share of such income, gain or loss shall be included in his taxable year in which ends the partnership period ending with such transaction. Under this subsection, a partner's death does not constitute such liquidation.

Payments made in liquidation of the interest of a partner who retires or dies shall be taxed as a sale or exchange of such partner's interest in partnership assets, to the extent that they represent such interest, and the balance shall be taxed as the partner's distributive share of partnership income. Under this subsection, amounts

paid for unrealized receivables or good will of the partnership shall not be included in payments representing a partner's interest in partnership assets except to the extent that the partnership agreement provides for payment with respect to good will.

(c) If a partner shall compute his gross income in accordance with the provisions of section 36 of this act, he shall not be entitled to take the deductions set forth in section 35(a) of this act.

(d) In determining the extent to which a partner's distributive share is derived from sources within his source State, no effect shall be given to a provision in the partnership agreement which

(1) characterizes payments to the partner as being for services or for the use of capital, or

(2) allocates to the partner, as income or gain derived from sources outside his source State, a greater proportion of his distributive share of partnership income or gain than the ratio of partnership income or gain derived from sources outside his source State to partnership income or gain from all sources, except as authorized in subsection (e), or

(3) allocates to the partner a greater proportion of a partnership item of loss or deduction derived from sources within his source State than his proportionate share of partnership loss or deduction from all sources, except as authorized in subsection (e).

(e) The Division of Taxation may adopt regulations to authorize the use of such other methods of determining a

partner's portion of partnership item derived from sources within his source State, and the modifications related thereto, as may be appropriate and equitable to insure that only that portion of a partner's distributive share derived from sources within his source State shall be included within such share. L.1961, c. 32, p. 141, § 31, as amended L.1961, c. 129, p. 772, § 18.

54:8A-32. Computation of gross income of taxpayer

Except as otherwise provided in this act or by regulations pursuant to this act, a taxpayer shall compute his gross income by totaling his gains, losses, profits and income derived from salaries, wages or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property of whatever nature, growing out of the ownership or use of or interest in such property; also from interest, rent, royalties, dividends, securities, or the transaction of any business carried on for gain or profits and income derived from any source whatever within the source State, including prizes and awards (other than those primarily in recognition of some achievement in the arts, sciences or public interest without active entry by the recipient and without requirement that he render substantial future services as a condition), or gains or profits or income derived through estates or trusts by the beneficiaries thereof, whether as distributed or distributive shares. In any case, the term "gross income" shall include capital gains or capital loses only to the extent provided in section 39 of this act. L.1961, c. 32, p. 141, § 32, as amended L.1961, c. 129, p. 773, § 19.

Appendix C

54:8A-33. Income derived from sources within taxpayer's source; exclusions from gross income

(a) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from sources within the taxpayer's source State only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in his source State.

(b) Compensation paid by the United States for service in the Armed Forces of the United States, performed by an individual during an induction period, shall not constitute income derived from sources within his source State.

(c) There shall be excluded from gross income all amounts received:

(1) as a pension or retirement allowance,

(2) under a life insurance contract payable by reason of death,

(3) under a workmen's compensation act for personal injuries or sickness,

(4) through accident and health insurance for personal injuries or sickness except to the extent that such amounts are piad by or are attributable to contributions by the employer,

(5) by gift, bequest, devise or inheritance,

(6) which constitute wages or payments in lieu of wages for a period during which the employee is absent from work on account of personal injuries or sickness; but this subsection shall not

apply to the extent that such amounts exceed a weekly rate of $100.00. This shall not apply to amounts attributable to the first 30 calendar days in such period, if such amounts are at a rate which exceeds 75% of the regular weekly rate of wages of the employee. If amounts attributable to the first 30 calendar days in such period are at a rate which does not exceed 75% of the regular weekly rate of wages of the employee, the first part of this subsection shall not apply to the extent that such amounts exceed a weekly rate of $75.00, and shall not apply to amounts attributable to the first 7 calendar days in such period unless the employee is hospitalized on account of personal injuries or sickness for at least 1 day during such period.

(d) In the case of a taxpayer who computes his gross income in accordance with the provisions of section 36, income and other amounts excluded from gross income under the provisions of this section shall be excluded only to the extent that such income and amounts would otherwise be included in Federal adjusted gross income. L.1961, c. 32, p. 142, § 33, as amended L.1961, c. 129, p. 774, § 20; L.1964, c. 279, § 1.

54:8A-34. "Net income" defined

The term "net income" means the gross income of a taxpayer less the deductions allowed by this act. L.1961, c. 32, p. 142, § 34.

Appendix C

54:8A-35. Computation of net income; deductions

(a) In the computation of net income, the taxpayer may deduct from gross income the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business; the ordinary and necessary nonbusiness or nontrade expenditures paid or incurred for the production or collection of income which, if and when realized, will be required to be included in income for the purpose of taxation under this act, or for the management, conservation or maintenance of property held for the production of such income but such deductions from gross income are allowable only if, and to the extent that, they are connected with income arising from sources within taxpayer's source State and taxable under this act.

(b) The taxpayer may also deduct from his gross income, in lieu of his standard deduction:

(1) Deductions for charatable contributions as defined in section 37(b)(4) but limited to his source State or to any political subdivision thereof, or any corporation, trust, community chest, fund, foundation or other entity organized or operated under the laws of his source State;

(2) Deductions for alimony or separate maintenance payments includible in the gross income of a recipient subject to tax under this act;

(3) Deductions for losses of real or tangible personal property having an actual situs in his source State, arising from fire, storm, shipwreck or other casualty, or from theft, shall be allowed only to the extent that the amount of loss to an individual arising from each casualty, or from each theft, exceeds $100.00. For purposes of the

$100.00 limitation, a husband and wife making a joint return for the taxable year in which the loss is allowed as a deduction shall be treated as one individual.

(4) Deductions, with respect to real or tangible personal property having an actual situs in his source State, for losses (other than capital losses) incurred in any transaction entered into for profit but not connected with the taxpayer's trade or business; and

(5) Deductions determined under regulations of the Division of Taxation to be connected with his gross income, except deductions for income taxes imposed by this State or any other taxing jurisdiction. L.1961, c. 32, p. 143, § 35, as amended L. 1961, c. 129, p. 775, § 21; L.1964, c. 279, § 2.

54:8A-36. Computation of gross income from federal adjusted gross income figure

(a) The Legislature hereby finds and determines that to permit taxpayers under this act to compute their gross income for tax purposes from the Federal adjusted gross income figure used in their tax returns to the Federal Government will reduce the cost and simplify the administration of this act, and will simplify the preparation of State income tax returns by taxpayers. The Legislature further finds and determines that such method of computing gross income will not materially reduce and may increase the amount of revenue derived with respect to this act; and therefore, directs that each taxpayer be permitted, as an alternative to the method prescribed by section 32 of this act, to compute his gross income as provided in subsection (b) of this section.

(b) A taxpayer computing his gross income under the provisions of this subsection shall:

(1) Determine the net amount of income, gain, loss and deduction entering into his Federal adjusted gross income for the taxable year which is derived from sources within his state, including:

(A) His distributive share of partnership income, gain, loss and deduction derived from sources within his source state, and

(B) His share of estate and trust income, gain, loss and deduction derived from sources within his source State.

(2) Add to such amount the following types of income and gain derived from the sources of income and gain listed below:

(A) Interest income from the obligations of any state or political subdivision thereof except where, by the laws of such state, its own taxpayers are exempted from taxation with respect to such interest income, subject to the provisions of section 33;

(B) Interest or dividend income from the obligations or securities of any authority, commission or instrumentality of the United States, which the laws of the United States exempt from Federal income taxation, but not from State income taxation, subject to the provisions of section 33;

(C) Amounts deductible with respect to income taxes imposed by this State or any other taxing jurisdiction in determining Federal adjusted gross income unless such amounts are credited against Federal income tax; and

(D) Amounts deductible with respect to interest on indebtedness which is incurred or continued in order to purchase or retain securities or obligations the income from which is exempt from tax under this act, subject to the provisions of section 33;

(E) In the case of a taxpayer who has deducted ½ of the amount by which net long-term capital gain exceeds net short-term capital loss for the taxable year, ⅕ of the amount so deducted;

(3) Subtract from such net amount the following types of income and gain derived from the sources of income and gain listed below:

(A) Interest income from obligations of the United States and its possessions to the extent that such interest is includible in gross income for Federal income tax purposes;

(B) Interest or dividend income from the obligations or securities of any authority, commission or instrumentality of the United States, to the extent that such amounts of income are includible in gross income for Federal income tax purposes, and exempt from State income taxation under the laws of the United States;

(C) Interest or dividend income from obligations or securities to the extent that such income is exempted from taxation by the laws of this State authorizing the issuance of the underlying obligations and securities and includible in gross income for Federal income tax purposes;

(D) The amount of any refund or credit for overpayment of income taxes imposed by this State or any other taxing jurisdiction, to the extent that such refund is includible in gross income for Federal income tax purposes.

(4) There may be provided by regulation such modifications as shall be necessary to insure that only that portion of the taxpayer's Federal adjusted gross income which is derived from sources within his source state shall be included in his gross income for purposes of this act.

(c) A taxpayer who computes his gross income in accordance with the provisions of this section shall not be entitled to the deductions set forth by section 35(a) but, in lieu of the standard deduction, shall be permitted the deductions in sections 35(b) and 37 of this act.

(d) The amount of the gross income of a taxpayer computed in accordance with the provisions of this section shall be conclusively presumed by the Division of Taxation to be the same as such taxpayer's gross income would have been if computed in accordance with the provisions of section 32 except that if the amount of a taxpayer's Federal adjusted gross income or Federal items of tax preference is changed or corrected by the taxpayer or the United States Internal Revenue Service or other competent authority, or as the result of a renegotiation of a contract or subtract with the United States, the taxpayer shall report such change or correction in Federal Taxable income or Federal items of tax preference within 90 days after the final determination of such change, correction, or renegotiation, or as otherwise required by regulation, and shall concede the accuracy

of such determination or state wherein it is erroneous. Any taxpayer filing an amended Federal income tax return shall also file within 90 days thereafter an amended return under this act, and shall give such information as the Division of Taxation may require. There may be provided by regulation such exceptions to the requirements of this section as may be necessary to carry out the purposes of this section.

L.1961, c. 32, p. 144, § 36. Amended by L.1961, c. 129, p. 776, § 22; L.1970, c. 304, § 6; L.1972, c. 12, § 5.

54:8A-37. Additional deductions

(a) In addition to the deductions authorized in section 35(b), any taxpayer shall be allowed the deductions itemized in this section to the same extent that such deductions are allowed to New Jersey residents who are subject to the income tax laws of a critical area state other than New Jersey. To the extent that any deduction itemized in this section has been taken by a taxpayer to compute his Federal adjusted gross income, such deductions shall not be allowed to a taxpayer computing his gross income in accordance with the provisions of section 36 of this act.

(b) Subject to the limitations expressed in subsection (a) hereof and any other limitations set forth in this act, the following deductions shall be allowed:

(1) Deduction of interest or accrued within the taxable year on indebtedness except interest on indebtedness incurred or continued to purchase or carry obligations or securities the income from which is exempt from tax under this act.

(2) Deduction of taxes paid or accrued within the taxable year except—

Appendix C

(A) Income taxes imposed by this State or any other taxing jurisdiction,

(B) Federal import duties, excise and stamp taxes,

(C) Estate, inheritance, legacy, succession and gift taxes,

(D) Taxes assessed against local benefits of a kind tending to increase the value of the property assessed, and

(E) License fees payable for operation or ownership of motor vehicles; State and local license fees; taxes on cigarettes, other tobacco products and alcoholic beverages.

(3) Deductions of losses sustained during the taxable year, not compensated by insurance or otherwise, except—

(A) Losses, not incurred in a trade or business or in any transaction entered into for profit, shall be allowed only if they arise from fire, storm, shipwreck or other casualty or from theft, and only to the extent that the amount of loss to an individual arising from each casualty, or from each theft, exceeds $100.00;

(B) Losses from gambling activities shall be allowed only to the extent of the gains from such activities;

(4) Deduction of any charitable contribution payment of which is made within the taxable year to the extent that the aggregate of such contributions does not exceed 20% of the taxpayer's gross income.

In addition, there shall be allowed a deduction of any charitable contribution not in excess of 10% of the tax-

payer's gross income which is made by the taxpayer within the taxable year to a religious organization, an educational organization which normally maintains a regular faculty and has a regularly enrolled body of students in attendance, an organization, the principal purposes or functions of which are the providing of medical or hospital care or medical education or medical or agricultural research, a governmental unit or organization referred to in subparagraph (B) below which normally receives a substantial part of its support from a governmental unit described in subparagraph (A) below or from direct or indirect contributions from the general public.

In the case of an individual, if the amount of charitable contributions described above, payment of which is made within a taxable year beginning after December 31, 1963, exceeds 30% of the taxpayer's adjusted gross income for such year (computed without regard to any net operating loss carryback to such year), such excess shall be treated as a charitable contribution paid in each of the 5 succeeding taxable years in order of time.

For the purposes of this section, the term "charatible contribution" means a contribution or gift to or for the use of

> (A) A state, territory, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.
>
> (B) A corporation, trust, community chest, fund or foundation—
>
> (i) Created or organized in the United States or in any possession thereof, or under the law of the United States, any state or territory, the

District of Columbia, or any possession of the United States;

(ii) Organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(iii) No part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(iv) No substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

(C) A post or organization of war veterans, or an auxiliary unit or society of, or trust or foundation for, any such post or organization—

(i) Organized in the United States or any of its possesions, and

(ii) No part of the net earnings of which inures to the benefit of any private shareholder or individual.

(D) A domestic fraternal society, order, or association, operating under the lodge system, but only if such contribution or gift is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

(E) A cemetery company owned and operated exclusively for the benefit of its members or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily

incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual.

(5) (A) Deduction of expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse or a dependent as follows:

(i) If neither the taxpayer nor his spouse has attained the age of 65 before the close of the taxable year—

(a) The amount of such expenses for the care of any dependent who—

(1) Is the mother or father of the taxpayer or of his spouse, and

(2) Has attained the age of 65 before the close of the taxable year, and

(b) The amount by which such expenses for the care of the taxpayer, his spouse, and such dependents (other than any dependent described in paragraph (a) of this subsection) exceed 3% of gross income.

(ii) If either the taxpayer or his spouse has attained the age of 65 before the close of the taxable year—

(a) The amount of such expenses for the care of the taxpayer and his spouse,

(b) The amount of such expenses for the care of any dependent described in paragraph (i) (a), and

(c) The amount by which such expenses for the care of such dependents (other than any dependent described in paragraph (i)(a)) exceeds 3% of the gross income.

(B) Amounts paid during the taxable year for medicine and drugs which (but for this paragraph) would be taken into account in computing the deduction under subsection (A) shall be taken into account only to the extent that the aggregate of such amounts exceeds 1% of gross income, except that the gross income limitation herein shall not apply to amounts paid for the care of the taxpayer and his spouse, if either of them has attained the age of 65 before the close of the taxable year, or for the care of the mother or father of the taxpayer or of his spouse, and has attained the age of 65 before the close of the taxable year.

(C) Except as provided in subsection (E), the deduction under this section shall not exceed $5,000.00, multiplied by the number of $600.00 exemptions allowed for the taxable year as a deduction under section 10 of this act (other than exemptions relating to additional exemptions for age or blindness); except that the maximum deduction under this section shall be—

(i) $10,000.00, if the taxpayer is single and not the head of a household and not a surviving spouse or is married but files a separate return; or

(ii) $20,000.00, if the taxpayer files a joint return with his spouse or is the head of a household or a surviving spouse.

(D) For purposes of subsection (A), expenses for the medical care of the taxpaper which are paid out of his estate during the 1-year period beginning with the day after the date of his death shall be treated as paid by the taxpayer at the time incurred.

(E) (i) Subject to the provisions of paragraph (ii) hereunder the deductions under this subsection shall not exceed—

(a) $20,000.00, if the taxpayer has attained the age of 65 before the close of the taxable year and is disabled, or if his spouse has attained the age of 65 before the close of the taxable year and is disabled and if his spouse does not make a separate return for the taxable year, or

(b) $40,000.00, if both the taxpayer and his spouse have attained the age of 65 before the close of the taxable year and are disabled and if the taxpayer files a joint return with his spouse.

(ii) For purposes of paragraph (i) hereunder

(a) Amounts paid by the taxpayer during the taxable year for medical care, other than amounts paid for—

(1) His medical care, if he has attained the age of 65 before the close of the taxable year and is disabled, or

(2) The medical care of his spouse, if his spouse has attained the age of 65 before the close of the taxable year and is disabled, shall be taken into account only to the extent that such amounts do not exceed the maximum limitation provided in subsection (C) herein which would (but for the provisions of this subsection) apply to the taxpayer for the taxable year;

(b) If the taxpayer has attained the age of 65 before the close of the taxable year and is disabled, amounts paid by him during the taxable year for his medical care shall be taken into account only to the extent that such amounts do not exceed $20,000.00; and

(c) If the spouse of the taxpayer has attained the age of 65 before the close of the taxable year and is disabled, amounts paid by the taxpayer during the taxable year for the medical care of his spouse shall be taken into ac-

count only to the extent that such amounts do not exceed $20,000.00.

(iii) For purposes of paragraph (i) hereunder, an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be disabled unless he furnishes proof of the existence thereof in such form and manner as the Division of Taxation may require.

(iv) For purposes of paragraph (i) hereunder, the determination as to whether the taxpayer or his spouse is disabled shall be made as of the close of the taxable year of the taxpayer, except that if his spouse dies during such taxable year such determination shall be made with respect to his spouse as of the time of such death.

(6) Deduction shall be allowed for expenses paid during the taxable year by a taxpayer who is a woman or a widower or is a husband whose wife is incapacitated or is institutionalized, for the care of the taxpayer's child or stepchild under the age of 13 years or is physically or mentally incapable of caring for himself, but only if such care is for the purpose of enabling the taxpayer to be gainfully employed but such deduction shall not exceed $600.00 for any taxable year. The $600.00 limit herein shall be increased (to an amcunt not above $900.00) by the amount of expenses incurred by the taxpayer for any period during which the taxpayer had two or more dependents.

In the case of a married woman, and in the case of a husband whose wife is incapacitated, this deduction shall be allowed only if a joint return is filed, and shall be re-

duced by the amount (if any) by which the adjusted gross income of the taxpayer and his spouse exceeds $6,000.00.

(7) Deduction for amounts paid by a husband to his wife for alimony, support or separate maintenance pursuant to a court decree or for support or maintenance pursuant to a written separation agreement.

(8) Deductions shall be allowed for moving expenses paid or incurred during the taxable year in connection with the commencement of work by the taxpayer as an employee at a new principal place of work.

(A) No deduction shall be allowed unless

(i) The taxpayer's new principal place of work

(a) Is at least 20 miles farther from his former residence than was his former principal place of work or

(b) If he had no former principal place of work, is at least 20 miles from his former residence, and

(ii) During the 12-month period immediately following his arrival at the general location of his new principal place of work, the taxpayer is a full-time employee, in such general location, during at least 39 weeks.

(B) Moving expenses means only the reasonable expenses

(i) Of moving household goods and personal effects from the former residence to the new residence and

(ii) Of traveling (including meals and lodging) from the former residence to the new place of residence.

In the case of any individual other than the taxpayer, expenses referred to herein shall be taken into account only if such individual has both the former residence and the new residence as his principal place of abode and is a member of the taxpayer's household.

(C) No deductions shall be allowed under this section for any item to the extent that the taxpayer received reimbursement or other expense allowance for such item which is not included in his gross income.

(9) In addition to any deduction taken under section 35(a) of this act or in the computation of Federal adjusted gross income in the case of a taxpayer who has computed his gross income in accordance with the provisions of section 36 of this act, there shall be allowed a deduction for all the ordinary and necessary expenses paid or incurred by a taxpayer, including traveling expenses while away from home, as an employer or an employee during the taxable year in carrying on or working at any trade or business.

(10) Deduction for net premiums paid or incurred by a taxpayer during the taxable year with respect to any life insurance or endowment policy upon his life, but such deduction shall not exceed $150.00 in the aggregate; provided, however, for taxable years beginning on or after January 1, 1971 such amount shall not exceed $100.00 in the aggregate; and for taxable years beginning on or after January 1, 1972, such amount shall not exceed $50.00 in the aggregate; and for taxable years beginning on or after January 1, 1973, no such deduction shall be allowed.

(c) Any taxpayer who elects to take the itemized deductions allowed in this section shall be permitted to

take the full amount of the deduction permitted in section 35(b) and in this section except that if (a) his gross income, as defined in section 7, is exceeded by (b) his entire gross income by more than $100.00, his itemized deductions allowed in section 35(b) and this section shall be limited by the percentage which (a) is of (b). The manner for determining a taxpayer's entire gross income shall be provided by regulation. Such regulations may authorize the use of Federal adjusted gross income for this purpose.

L.1961, c. 32, p. 144, § 37. Amended by L.1961, c. 129, p. 779, § 23; L.1964, c. 279, § 3; L.1970, c. 304, § 7.

54:8A-37.1. Deductions for allocable expenses attributable to items of tax preference

(a) The deductions for allocable expenses attributable to items of tax preference is the total of the deductions for allocable expenses, as defined in subsection (b) of this section, minus the total of deductions allowable under sections 35 (C. 54:8A-35) and 37 (C. 54:8A-37) multiplied by a fraction, the numerator of which is the taxpayer's gross income for the taxable year and the denominator of which is the taxpayer's gross income for the taxable year plus the sum of the items of tax preference of the taxpayer for the taxable year, as defined in section 10(b) of this amendatory and supplementary act.

(b) The allocable expenses for purposes of this section for the taxable year shall include that portion of deductions lalowable under sections 35 and 37 consisting of the following:

(1) Interest deductible solely by reason of section 163 of the internal revenue code of 154 as modified by the

applicable subtractions and additions provided for in sections 36 (C. 54:8A-36) and 37 (C. 54:8A-37) of this act;

(2) Taxes deductible solely by reason of section 164 of the internal revenue code of 1954;

(3) Charitable contributions deductible under section 170 of the internal revenue code of 1954;

(4) Amounts deductible by cooperative housing tenant-stockholders solely by reason of section 216 of the internal revenue code of 1954.

(c) However, this section shall apply only if the sum of the items of tax perference of the taxpayer for the taxable year, as defined in section 10(b) of this amendatory and supplementary act exceeds the specific deduction described in section 10(c) of this amendatory and supplementary act.

L. 1970, c. 304, § 11.

54:8A-38. Inventories

Whenever the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the regulations hereunder may prescribe, conforming as nearly as may be to the best accounting practice in the trade or business and most clearly reflecting the income. L.1961, c. 32, p. 144, § 38.

54:8A-39. Net capital gain or loss; computation; deductions

(a) The net capital gain or loss of a taxpayer shall be computed by totaling the gains from sales or other dis-

positions during the taxable year of capital assets having an actual situs within the source state and subtracting therefrom the losses from sales or other dispositions of capital assets having an actual situs in the source state.

(b) (1) In any taxable year in which a taxpayer has a net capital loss such loss shall be allowed as a deduction from gross income only to the extent of $1,000.00 or the taxpayer's net income whichever is lower.

(2) Subject to the limitation of paragraph (1) hereof, if for any taxable year the taxpayer has a net capital loss, the amount thereof shall be treated as a capital loss and deductible from gross income in each of the succeeding taxable years to the extent that such amount exceeds the total of any net capital gains of any taxable years intervening between the taxable year in which the net capital loss arose and such suceeding taxable year. For purposes of this section, a net capital gain shall be computed without regard to such net capital loss or to any net capital losses arising in any such intervening taxable years.

(c) In any taxable year in which net capital gain exceeds the net capital loss, 40% of the amount of such excess shall be a deduction from gross income.

L.1961, c. 32, p. 145, § 39. Amended by L.1961, c. 129, p. 787, § 24; L.1962, c. 70, § 7; L.1964, c. 279, § 4; L.1972, c. 12, § 6.

54:8A-40. Items not deductable

In computing net income and net capital gain no deduction shall in any case be allowed in respect of:

a. Personal, living, or family expenses.

b. Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate.

c. Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made.

d. Any amount otherwise allowable as a deduction which is allocable to income not required to be included in gross income for the purposes of this act, unless allowed by regulation, which shall also provide for the apportionment or allocation of such deductions as between income which would be required to be included in gross income under this act and income which would not be required to be so included.

L.1961, c. 32, p. 145, § 40, as amended L.1961, c. 129, p. 788, § 25.

54:8A-41. "Capital assets" defined

The words "capital assets" mean property held by the taxpayer (whether or not connected with his trade or business), but do not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or land used in the trade or business, or property used in the trade or business of a character which is subject to an allowance for depreciation.

L. 1961, c. 32, p. 146, § 41.

Appendix C

54:8A-42. Basis of property; gain or loss from sale or other disposition of property

(a) The basis of property, except as otherwise provided in this act, shall be the cost of such property.

(1) If the property should have been included in the last inventory, the basis shall be the last inventory value thereof.

(2) The basis of property in the hands of a person acquiring the property from a decedent other than by purchase or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the date of the decedent's death.

(3) If the property was acquired by gift the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that if such basis is greater than the fair market value of the property at the time of the gift, then for the purpose of determining loss the basis shall be such fair market value.

(4) If the basis of property cannot otherwise be established, the basis of such property shall be the fair market value at the time of acquisition.

(b) The gain from the sale or other disposition of property shall be the excess of the amount realized over the basis of such property and the loss shall be the excess of the basis of such property over the amount realized. L.1961, c. 32, p. 146, § 42, as amended L.1961, c. 129, p. 788, § 26.

Appendix C

54:8A-43. Agreements with taxpayer relating to liability

The Division of Taxation is authorized to enter into a written agreement with any taxpayer relating to the liability of such taxpayer in respect of any tax, fee, penalty or interest heretofore or hereafter imposed by this act, if it is found that such agreement is in the best interests of the State, which agreement shall be final and conclusive, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact:

(a) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of this State, and

(b) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded.

L.1961, c. 32, p. 146, § 43, as amended L1961, c. 129, p. 789, § 27.

54:8A-44. Persons required to file

(a) On or before the filing date prescribed in section 18 (C. 54:8A-18) of this act, an income tax return shall be made and filed by or for every individual having a gross income derived from sources within his source state in excess of the sum of his personal exemptions allowed in section 10 (C. 54:8A-10) of this act, or having any items of tax preference derived from or connected with New Jersey sources in excess of the specific deduction provided in section 6.2(c) (C. 54:8A-6.2.(c)).

(b)(1) If the Federal income tax liability of husband or wife is determined on a separate Federal return, their New Jersey income tax liabilities and returns shall be separate.

(2) If the Federal income tax liabilities of husband and wife (other than a husband and wife described in paragraph (3)) are determined on a joint Federal return, or if neither files a Federal return:

(A) They shall file a joint New Jersey income tax return, and their tax liabilities shall be joint and several, or

(B) They may elect to file separate New Jersey income tax returns on a single form if they comply with the requirements of the Division of Taxation in setting forth information, and in such event their tax liabilities shall be separate.

(3) If either husband or wife is a resident and the other is a nonresident, they shall file separate New Jersey income tax returns on such single or separate forms as may be required by the Division of Taxation, and in such event their tax liabilities shall be separate.

(4) Marital or other status. An individual's marital or other status under subsection 2(c) (C. 54:8A-2(c)), subsection 9(b) of P.L.1961, c. 32 (C. 54:8A-9(b)) and subsection 7(a)(3)(B) of this amendatory and supplementary act shall be presumed to be the same as his marital or other status for purposes of establishing the applicable Federal income tax rates. However, an individual who is a nonresident alien for Federal income tax purposes and who fails to qualify under subsection 2(c), or subsection 9(b) of P.L. 1961, c. 32 or subsection 7(a)(3)(B) of this amendatory and supplementary act

solely by reason of his status for purposes of establishing the applicable Federal income tax rates shall, nevertheless, qualify under such provisions provided he files a statement with his return setting forth such information in respect to his status as the director shall prescribe.

(c) The return of any deceased individual shall be made and filed by his fiduciary or other person charged with his property.

(d) The return for an individual who is unable to make a return by reason of minority or other disability shall be made and filed by his fiduciary or other person charged with the care of his person or property (other than a receiver in possession of only a part of his property), or by his duly authorized agent.

(e) Any tax under this act, and any increase, interest or penalty thereon, shall, from the time it is due and payable, be a personal debt of the person liable to pay the same, to the State of New Jersey.

(f) If the amount of net income or Federal items of tax preference for any year of any taxpayer as returned to the United States Treasury Department or to an appropriate State officer is changed or corrected by the taxpayer or the Commissioner of Internal Revenue or other officer of the United States or other competent authority, or where a renegotiation of a contract or subcontract with the United States results in a change in net income, or Federal items of tax preference such taxpayer shall report such change or corrected net income, or Federal items of tax preference or the results of such renegotiation within 90 days after the final determination of such change or correction or renegotiation, or as required by regulation, and shall concede the accuracy of such determination or state where-

in it is erroneous. Any taxpayer filing an amended return with such department or officer shall also file within 90 days thereafter an amended return in this State which shall contain such information as the regulations shall require.

L.1961, c. 32, p. 147, § 44. Amended by L.1961, c. 129, p. 789, § 28; L.1962, c. 70, § 8; L.1970, c. 304, § 8; L.1972, c. 12, § 7; L.1978, c. 131, § 5, eff. Oct. 18, 1978.

54:8A-45. Repealed. L.1962, c. 70, § 12

54:8A-46. Actions for collection of tax

(a) At the request of the Division of Taxation, the Attorney General may bring suit, in the name of this State, in the appropriate court of any other State to collect any tax legally due this State under this act.

(b) The courts of this State shall recognize and enforce liabilities for taxes lawfully imposed by any other State, upon incomes, which extends a like comity to this State, and the duly authorized officer of any such State may sue for the collection of such a tax in the courts of this State. A certificate of the Secretary of State of such other State that an officer suing for the collection of such a tax is duly authorized to collect the same shall be conclusive proof of such authority.

(c) For the purposes of this section, the words "tax" and "taxes" shall include interest and penalties due under this act, and liability for such interest or penalties or both, due under a taxing statute of another State shall be recognized and enforced by the courts of this State

to the same extent that the laws of such other State permit the enforcement in its courts of liability for such interest or penalties or both, due under this act. L.1961, c. 32, p. 149, § 46, as amended L.1961, c. 129, p. 792, § 30; L.1962, c. 70, § 9.

54:8A-47. Payment of tax; signing of documents; certification of statements

(a) A person required to make and file a return under this act shall without assessment, notice or demand, pay any tax due thereon to the Division of Taxation on or before the date fixed for filing such return (determined without regard to any extension of time for filing the return). The Division of Taxation shall prescribe by regulation the place for filing any return, declaration, statement, or other document required pursuant to this act and for payment of any tax.

(b) Any return, declaration, statement or other document required to be made pursuant to this act shall be signed in accordance with regulations or instructions prescribed by the Division of Taxation. The fact that an individual's name is signed to a return, declaration, statement, or other document, shall be prima facie evidence for all purposes that the return, declaration, statement or other document was actually signed by him.

(c) The making or filing of any return, declaration, statement or other document or copy thereof required to be made or filed pursuant to this act, including a copy of a Federal return, shall constitute a certification by the person making or filing such return, declaration, statement or other document or copy thereof that the statements contained therein are true and that any copy filed is a true copy. L.1961, c. 32, p. 150, § 47, as amended L.1961, c. 129, p. 792, § 31.

Appendix C

54:8A-48. Taxable year; method of accounting

(a) A taxpayer's taxable year under this act shall be the same as his taxable year for Federal income tax purposes.

(b) If a taxpayer's taxable year is changed for Federal income tax purposes, his taxable year for purposes of this act shall be similarly changed. If a taxable year of less than 12 months results from a change of taxable year, the standard deduction, and the exemptions shall be prorated under regulations of the Division of Taxation.

(c) A taxpayer's method of accounting under this act shall be the same as his method of accounting for Federal income tax purposes. Net income shall be computed under such method as shall be prescribed by the Division of Taxation to reflect income.

(d) (1) If a taxpayer's method of accounting is changed for Federal income tax purposes, his method of accounting for purposes of this act shall be similarly changed.

(2) If a taxpayer's method of accounting is changed, other than from an accrual to an installment method, any additiontl tax which results from adjustments determined to be necessary solely by reason of the change shall not be greater than if such adjustments were ratably allocated and included for the taxable year of the change and the preceding taxable years, not in excess of 2, during which the taxpayer used the method of accounting from which the change is made.

(3) If a taxpayer's method of accounting is changed from an accrual to an installment method, any additional tax for the year of such change of method and for any

subsequent year which is attributable to the receipt of installment payments properly accrued in a prior year, shall be reduced by the portion of tax for any prior taxable year attributable to the accrual of such installment payments, in accordance with regulations of the Division of Taxation.

L.1961, c. 32, p. 151, § 48. Amended by L.1961, c. 129, p. 793. § 32; L.1972, c. 12, § 8.

54:8A-49. Withholding return

(a) Every employer required to deduct and withhold tax under this act shall, for each calendar quarter, on or before the last day of the month following the close of such calendar quarter, file a withholding return as prescribed by the Division of Taxation and pay over to the Division of Taxation the taxes so required to be deducted and withheld; but the Division of Taxation may, by regulation, provide that every such employer shall on or before the fifteenth day of each month pay over to the Division of Taxation, or a depositary designated by the Division of Taxation, the taxes so required to be deducted and withheld if such taxes aggregate $100.00 or more for the preceding calendar month. Where the aggregate amount so deducted and withheld by any employer is less than $25.00 in a calendar quarter and the aggregate for the calendar year can reasonably be expected to be less than $100.00, the Division of Taxation may by regulation permit an employer to file an annual return. The Division of Taxation may, if it believes such action necessary for the protection of the revenues, require any employer to make such return and pay to it the tax deducted and withheld at any time, or from time to time.

(b) Whenever any employer fails to collect, truthfully account for, pay over the tax, or make returns of the tax as required in this section, the Division of Taxation may serve a notice requiring such employer to collect the taxes which become collectible after service of such notice, to deposit such taxes in a bank approved by the Division of Taxation in a separate account, in trust for and payable to the Division of Taxation and to keep the amount of such tax in such account until payment over to the Division of Taxation. Such notice shall remain in effect until a notice of cancellation is served by the Division of Taxation. L.1961, c. 32, p. 151, § 49, as amended L.1961, c. 129, p. 794, § 33.

54:8A-50. Liability of employer required to withhold tax; special fund; right of action against employer

Every employer required to deduct and withhold tax under this act is hereby made liable for such tax. For such purposes any amount required to be withheld and paid over to the Division of Taxation shall be considered the tax of the employer. Any amount of tax actually deducted and withheld under this act shall be held to be a special fund in trust for the Division of Taxation. No employee shall have any right of action against his employer in respect to any moneys deducted and withheld from his wages and paid over to the Division of Taxation in compliance or in intended compliance with this act. L.1961, c. 32, p. 152, § 50, as amended L.1961, c. 129, p. 795, § 34.

Appendix C

54:8A-51. Failure of employer to deduct and withhold tax or to pay tax withheld

(a) If an employer fails to deduct and withhold tax as required, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer, but the employer shall not be relieved from liability for any penalties, interest, or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

(b) If any employer shall fail to make a return and pay a tax withheld by him at the time required by or under the provisions of this act, such employer shall be liable for such tax and shall pay the same together with all penalties and interest charges thereon as provided in the case of any taxpayer under section 53 of this act, and such additional amount of penalties and interest shall in no case be charged to or collected from the taxpayer by said employer. The Division of Taxation shall have the same rights and powers for the collection of such tax, penalties and interest against such employer as are now prescribed by this act for the collection of a tax against a taxpayer. L.1961, c. 32, p. 152, § 51, as amended L.1961, c. 129, p. 795, § 35; L.1962, c. 70, § 10.

54:8A-52. Reciprocity credit; relief from withholding

If it shall appear to the satisfaction of the division, based upon an opinion of the Attorney General of this State, that any person whose wages, salaries or commissions are subject to deduction and withholding are liable for tax upon the same income under the law of the State of which he is a resident, under circumstances such

as will entitle him to a reciprocity credit under this act sufficient to offset all taxes imposed hereunder, and that such State makes payment to the division of amounts deducted and withheld on account of earnings and gains derived by residents of this State from sources within such State and subject to tax under this act, the division may, by regulation, relieve residents of such State from being required to make any return under this act, and, upon the filing of such proofs as the regulations may require, relieve the employer of such taxpayers from the requirement to deduct and withhold any amount otherwise required by this act, for such period as the conditions herein stated continue to be satisfied; but the division may, notwithstanding the existence of such conditions, continue to require the making of such returns and the deduction and withholding of such amounts whenever it determines such action is appropriate or reasonably required to insure compliance with this act or whenever an appropriate official of such other State certifies that such State desires that such deduction and withholding be continued.

The division may consider amounts withheld under the provisions of this act as withheld for the benefit of the State of which such persons are resident but such amounts shall not be paid over to such State unless such State has complied with the provisions of this act and is thereby entitled to such amounts. Any amounts withheld, however, may be expended for any of the purposes specified in section 20 of this act. L.1961, c. 32, p. 152, § 52, as amended L.1961, c. 129, p. 796, § 36.

Appendix C

54:8A-53. Delinquent return or taxes; penalties; interest; abatement or remission

Any taxpayer who shall fail to file his return when due or to pay any tax when the same becomes due, as herein provided, shall be subject to such penalties and interest as provided in the State Tax Uniform Procedure Law, subtitle 9 of the Title 54 of the Revised Statutes. If the Division of Taxation determines that the failure to comply with any provision of this act was excusable under the circumstances, it may abate or remit such part or all of the penalty as shall be appropriate under such circumstances.

With respect to taxes paid not later than October 1, 1962, the Division of Taxation may also abate or remit such part all of the interest as shall be appropriate under such circumstances.

L.1961, c. 32, p. 153, § 53. Amended by L.1961, c. 129, p. 797, § 37; L.1962, c. 70, § 11; L.1975, c. 177, § 7, eff. Aug. 4, 1975.

54:8A-54: Applicability of state tax uniform procedure law

The taxes imposed by this act shall be governed in all respects by the provisions of the State tax uniform procedure law (subtitle 9 of Title 54 of the Revised Statutes) except only to the extent that a specific provision of this act may be in conflict therewith. L.1961, c. 32, p. 153, § 54.

Appendix C

54:8A-55. Administration; determination of amount of tax due

(a) The Division of Taxation in the Department of the Treasury shall administer the provisions of this act, adopt regulations necessary or desirable to effectuate its purposes or to make explicit the treatment of various items, authorize appropriate systems of acounting and computation, provide for the allocation of income, itemized deductions, gains and losses in cases where the source of connection thereof may be partly within and partly without the source State of the taxpayer, and prepare instructions for the guidance and information of taxpayers. Wherever possible, consistent with reasonable application of the provisions of this act, the division shall so prepare its regulations, forms, instructions and other acts to reduce the burden of making computations and returns under this act differently from similar computations and returns required of the same taxpayer with respect to the same income and gain to some other jurisdiction. The division shall also make procedural regulations for its review and correction of returns of taxpayers, the making of refunds or additional assessments of tax on such review or correction, and the assessment of the tax where no return is filed, as well as the method and time of giving due notice thereof and providing suitable methods for appropriate protest or hearing.

In addition to objects mentioned elsewhere in this act, such regulations may describe the treatment to be accorded to items of exchange of property and the recognition or non-recognition thereof, the deferment of gains from the sale of a personal residence, war losses, employee stock options, inclusions, exclusions and exemptions from gross income, pensions, common trust funds, and may

provide for the determination and assessment of interest or penalties, extensions of time for performing any act or making any payment, suspension of penalty or interest or both for limited periods, waiver or reduction of additional taxes, gathering of information and filing of reports for information, and all other matters reasonably required for the fair, impartial and practical administration of this act.

(b) Except as otherwise provider, the amount of tax due on any return shall be determined by the division within 3½ years after the return was made. When the return omits an amount greater than 25% of the gross income or capital gain reported, and which should have been included, such determination shall be made within 6½ years after the return was made. When no return is made, or when a return is made willfully false or fraudulent with intent to evade the tax, or if taxpayer fails to report a change or correction made by another taxing jurisdiction or fails to file an amended return when required to by this act, the amount of the tax may be determined at any time. Where, for 1 taxable year, a deduction disallowed appears to have been allowable in some other taxable year not more than 5 years prior thereto, the return for such earlier year may be revised and the tax for said year resettled, and if the same shall result in a lower tax for said earlier year, the overpayment may be allowed as a credit against, but not in excess of, any assessment resulting from the disallowance for the later year. L.1961, c. 32, p. 153, § 55.

Appendix C

54:8A-56. Exercise of powers and duties of Division of Taxation by director

All the powers, duties and responsibilities vested in the Division of Taxation by this act shall be exercised by the director thereof or his duly designated representative. L.1961, c. 32, p. 155, § 56, as amended L.1961, c. 129, p. 797, § 38.

54:8A-57. Effective date; suspension of tax

This act shall take effect immediately, but the tax imposed hereby, and the obligation to pay the same as well as the obligation to deduct and withhold shall be suspended and inoperative in the event that any of the moneys in the Transportation Fund shall be applied to a purpose or purposes other than one set forth in this act, from the date when such application is made until the amounts to be refunded to taxpayers as a result thereof have been allowed and paid; and the tax hereby imposed shall cease to be imposed, assessed and collected after the assessment therof for any taxable year ending December 31, 1980, and for any part of a taxable year beginning during the year 1980 and ending December 31, 1980.

L.1961, c. 32, p. 155, § 57, approved May 29, 1962. Amended by L.1969, c. 36, § 1, eff. May 9, 1969.

APPENDIX D

Notice of Appeal to the Supreme Court of the United States

(Filed—June 19, 1980)

IN THE SUPREME COURT OF THE STATE OF NEW JERSEY

A-60 SEPTEMBER TERM 1979

JOHN SALORIO, ROBERT COE and JOHN D. MCGARR, JR.,

Plaintiffs-Appellants,

v.

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Defendant-Respondent.

Notice is hereby given that plaintiffs, John Salorio, Robert Coe and John D. McGarr, Jr., the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey, affirming the constitutionality of the New Jersey Emergency Transportation Tax, 54 N.J. Stat. Ann. §8A-1-8A-57 (West) (Supp. 1979) and remanding for further proceedings, entered in this action on March 26, 1980.

This Appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

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No. 79-2026

Supreme Court, U. S.
FILED
OCT 1 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SALORIO, ROBERT COE and
JOHN D. McGARR, JR.,

Appellants,

v.

SIDNEY GLASER, Director of the Division of Taxation,
Department of the Treasury of the State of New Jersey,

Appellee.

On Appeal from the Supreme Court of New Jersey

APPELLANTS' SUPPLEMENTAL BRIEF

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September 30, 1980

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APPELLANTS' SUPPLEMENTAL BRIEF

Appellants submit this supplemental brief to advise the Court of certain facts which heighten the urgent need for this Court promptly to enforce the mandate of *Austin* v. *New Hampshire,* 420 U.S. 656 (1975), and to vindicate appellants' rights under the Privileges and Immunities Clause.

In our Jurisdictional Statement, we showed that New Jersey has managed to stave off compliance with *Austin* for over three years by engaging in dilatory motion practice in the New Jersey state courts. (Jur. St. at 9-10). We showed, in addition, that the remand ordered by the Supreme Court of New Jersey would create much more delay. (Jur. St. at 10). We now wish to advise the Court of yet another delaying action by New Jersey which will subject appellants to lengthy further proceedings in the state courts if the decision below is not immediately reversed.

On September 16, 1980, the Supreme Court of New Jersey, reversing the two lower courts, granted New Jersey's motion to stay all proceedings on remand, *including trial preparation,* pending the resolution of this appeal.* The decision did not set forth any reasoning. New Jersey argued in its brief in support of the motion for a stay first that the filing of an appeal with this Court ousted the lower court of jurisdiction—an argument that is contrary to every authority. Second, New Jersey argued that

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* The New Jersey trial court properly exercised its discretion in refusing to stay trial preparation. Thereafter, the Appellate Division denied New Jersey's motion for leave to appeal the trial court's order. The Supreme Court of New Jersey saw fit to reverse this discretionary decision of the trial court—without the benefit of oral argument. A copy of the order of the New Jersey Supreme Court is appended to this Brief.

it needed an *additional* four to five months to prepare for a one or two day trial—an incredible estimate that was not supported by any statement by a knowledgeable person and is directly in conflict with New Jersey's representation to this Court that the relevant evidence is already in the record. (Appellee's Cross Petition for Certiorari, No. 80-123, at 6-7.) The decision of the New Jersey Supreme Court to stay trial preparation and discovery pending disposition of this appeal will result in inordinate delay of the trial on remand. Indeed, if New Jersey continues to have its way, the trial date alone will not take place until at least *ten months* after the New Jersey Supreme Court remanded this three and a half-year old case for a hearing.

This summary decision of the New Jersey Supreme Court to stay all trial prepration is in itself a violation of appellants' rights and a further disregard of this Court's clear mandate in *Austin*. For this additional reason, we urge this Court to reverse immediately the decision below, with instructions to declare the New Jersey Commuter Income Tax unconstitutional in light of *Austin* v. *New Hampshire*.

Respectfully submitted,

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September 30, 1980

APPENDIX

Order of the Supreme Court of New Jersey dated September 16, 1980

SUPREME COURT OF NEW JERSEY

M-28 SEPTEMBER TERM 1980

JOHN SALORIO, ROBERT COE & JOHN D. MCGARR, JR.,

Plaintiffs-Respondents,

vs.

SIDNEY GLASER, Director, Division of Taxation,

Defendant-Movant.

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is granted and the matter is summarily reversed and remanded to the Superior Court, Chancery Division, Bergen County with directions that all discovery and pretrial proceedings be stayed pending the disposition by the United States Supreme Court of the Applications now before it.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 16th day of September, 1980.

STEPHEN W. TOWNSEND
Clerk

No. 79-2026

Supreme Court, U.S.
FILED
JUL 26 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SALORIO, ROBERT COE and
JOHN D. McGARR, JR.,

Appellants,

v.

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE GLASER TO DISMISS

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Questions Presented

1. Is the remand order of the Supreme Court of New Jersey a final judgment within the meaning of 28 U.S.C. §1257 when it expressly finds the present record inadequate to decide the principal federal issue raised by appellant and remands the case for a plenary trial on that issue?

2. Is a substantial federal question presented by the decision of the Supreme Court of New Jersey that a plenary trial should be conducted to determine whether the New Jersey Emergency Transportation Tax violates the Privileges and Immunities Clause of Article IV of the United States Constitution?

3. Is a substantial federal question presented by the decision of the Supreme Court of New Jersey that the New Jersey Emergency Transportation Tax is consistent with the requirements of the Equal Protection Clause of the Fourteenth Amendment?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	2
ARGUMENT:	
Point I—The appeal should be dismissed for lack of jurisdiction because an order remanding a case for plenary trial on the same federal issue which is the subject of the appeal is not a final judgment from which a party may appeal pursuant to 28 U.S.C. §1257	11
Point II—No substantial federal question is presented by a decision of the Supreme Court of New Jersey which remands a constitutional challenge to a state taxing statute for a plenary trial	17
CONCLUSION	21

Cases Cited

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959)	19, 20
Austin v. New Hampshire, 420 U.S. 656 (1975)	18
Baldwin v. Montana Fish and Game Com'n, 436 U.S. 371 (1978)	13
Catlin v. United States, 324 U.S. 229 (1945)	14
Central R.R., In re, 485 F.2d 208 (3rd Cir. 1973) (en banc) cert. den. (1974), Timpany v. New Jersey, 414 U.S. 1131	2

PAGE

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) 12, 13

DiBella v. United States, 369 U.S. 121 (1962) 14

General American Tank Car Corp. v. Day, 270 U.S. 367 (1926) 20

Gospel Army v. Los Angeles, 331 U.S. 543 (1947) 12

Hovey v. McDonald, 109 U.S. 150 (1883) 14

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 20

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 20

Market Street Railway Company v. Railroad Com'n of State of California, 324 U.S. 548 (1945) 12

Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978) 18

Robinson v. Cahill, 67 N.J. 333, 339 A.2d 193 (1975) 2

Shaffer v. Carter, 252 U.S. 37 (1920) 13, 19, 20

Travellers' Insurance Company v. Connecticut, 185 U.S. 364 (1902) 19, 20

United States v. MacDonald, 435 U.S. 850 (1978) 14

United States Constitution Cited

Article I, Section 10, Clause 3 10

Article IV ..... i, 9, 10, 12, 13, 17

Fourteenth Amendment ..... i, 10

PAGE

Statutes Cited

L. 1962, Ch. 70 7

N.J.S.A. 54:8A-1 (Emergency Transportation Tax Act) 3

N.J.S.A. 54:8A-2 4

N.J.S.A. 54:8A-5(c) 3

N.J.S.A. 54:8A-16(A) 4

N.J.S.A. 54:8A-16(B) 7

N.J.S.A. 54:8A-20 3

N.J.S.A. 54:8A-20(b)(1) 3

N.J.S.A. 54:8A-20(b)(2) 3

N.J.S.A. 54:8A-22 3

N.Y. Laws 1962, Ch. 2 4

New York Personal Income Tax Law:

Sec. 640 4

28 U.S.C.:

Sec. 1257 ..... i, 1, 11, 12, 16, 17, 21

Rules Cited

Rule 16(1)(a) 1

Rule 16(1)(b) 1

Other Authorities Cited

9 Moore's Federal Practice (1980):

par. 203.11, n. 1 14

PAGE

Note "The Finality Rule For Supreme Court Review of State Court Orders", 91 Harv. L. Rev. 1978):

1004, 1006 14

Wright, Miller, Cooper & Gressman, Federal Practice and Procedure Jurisdiction (1977):

Sec. 4010, pp. 585-586 12

No. 79-2026

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SALORIO, ROBERT COE and
JOHN D. McGARR, JR.,

Appellants,

v.

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE GLASER TO DISMISS

The appellee Glaser hereby moves to dismiss the appeal pursuant to Rule 16(1)(a) and (b) on the grounds that the order of the Supreme Court of New Jersey sought to be appealed is not a "final judgment" within the meaning of 28 U.S.C. §1257 or, in the alternative, that the federal questions presented for review either were not expressly passed on by the Supreme Court of New Jersey or are not substantial.*

* In addition to the within motion, the appellee has filed a cross petition for writ of certiorari seeking review of certain determinations of the Supreme Court of New Jersey in this same action.

Statement of the Case

Located in the huge New York City metropolitan area, New Jersey has been aptly referred to as a "corridor state". Each working day hundreds of thousands of commuters traverse the Hudson River separating New Jersey from New York. The limited number of available river crossings and the vast number of interstate commuters cause interstate transportation problems which are more substantial than those in any other area.

Since they are not self-sustaining, the principal interstate transportation facilities, such as buses and trains, must be substantially financed by the State of New Jersey. The New Jersey tax structure relies very heavily upon real property taxes which are among the highest in the Nation. Since real property taxes ordinarily are paid only by residents, nonresidents who commute to New Jersey traditionally have not contributed substantially to State revenues even though they derive substantial benefits from the New Jersey transportation system. The undue reliance by New Jersey upon local real property taxes also has severely restricted the State's capacity to provide vital public services. See *Robinson* v. *Cahill,* 67 N.J. 333, 339 A.2d 193 (1975). One of the public services which has placed heavy stress upon the fiscal resources of the State has been the transportation of interstate commuters. See, *e.g., In re Central R.R.*, 485 F.2d 208 (3rd Cir. 1973) (en banc) *cert. den., Timpany* v. *New Jersey,* 414 U.S. 1131 (1974).

In 1961, the New Jersey Legislature took cognizance of this pressing interstate transportation problem in the New York-northern New Jersey transportation area. The legislative means devised to generate the additional revenue needed to maintain and improve transportation facilities

between New Jersey and New York was the Emergency Transportation Tax Act (N.J.S.A. 54:8A-1, *et seq.*) (hereinafter referred to as "ETT") which is essentially a tax on individuals who use interstate transportation facilities. The imposition of the tax was expressly made contingent upon the annual certification by the New Jersey Commissioner of Transportation to the State Treasurer of the existence of a "critical transportation problem" in connection with transportation between this State and another state bordering thereon. N.J.S.A. 54:8A-5(c).

Significantly, all ETT revenues are paid into a special transportation fund. N.J.S.A. 54:8A-20. Other than the costs of administering the tax and of refunds to taxpayers, the ETT fund is used exclusively to finance projects and programs designed to alleviate transportation problems between New Jersey and New York (see Pa101 to Pa119).* The statute specifically provides that the ETT fund may not be used except upon a presentation to the Attorney General itemizing the purposes for which the funds will be used, and the transmittal of such itemization to the State Treasurer "with a certification by the Attorney General endorsed thereon that the purposes for which funds are therein proposed to be used are within the terms and intent of the act . . ." N.J.S.A. 54:8A-20(b)(2). If any of the moneys in the transportation fund are not used for one of the purposes specified in the Act, a taxpayer has the right to a refund or credit equal to his pro rata share of the fund. N.J.S.A. 54:8A-22.

When the ETT became effective, it was in practical effect applicable solely to New Jersey residents commuting

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* This notation refers to the appendix filed by the appellants with the Supreme Court of New Jersey.

to work in New York (Da20).* The ETT was imposed on individuals residing in either New Jersey or New York and deriving income in the other state. N.J.S.A. 54:8A-2. In addition, the New York Personal Income Tax was imposed on the income of New York residents and the New York income of New Jersey residents. The rates of the two taxes were similar. At that time both the New York Personal Income Tax (§640) and the New Jersey ETT (N.J.S.A. 54:8A-16(A)) provided for nonresident credits (Da21). The net result of these taxing and crediting provisions was that individuals living in New York or New Jersey paid a tax to the state in which they resided on their income derived from the other state.

The State of New York objected to this system of taxation of interstate commuters, and as early as June of 1961 then Governors Rockefeller and Meyner held discussions concerning possible changes in the operation of this system of taxation (Da50). Further discussions were held in December of 1961 between Governor Rockefeller and then Governor-elect Hughes (Da51). While these discussions continued, the New York State Legislature repealed §640 of the New York Personal Income Tax Law which had permitted New Jersey residents a credit for the ETT taxes paid to New Jersey (Ch. 2, N.Y. Laws of 1962 and Da21 and Da47). By this act New York also denied its residents their right to the ETT nonresident credit (which was based on reciprocal treatment of New Jersey residents by New York) and granted them a credit against their New York tax liability for the payments made to New Jersey under the ETT. The net result was to make New Jersey residents liable for both

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* This notation refers to the appendix filed by the appellee with the Supreme Court of New Jersey.

the New York Personal Income Tax and the ETT on New York—derived income and to make New York residents liable for only the ETT on their New Jersey—derived income (Da21 to Da22).

The controversy between New York and New Jersey continued thereafter, with New Jersey threatening to sue New York concerning the application of certain provisions of the New York tax law to New Jersey residents (Da53). The discussions to resolve the controversy eventually culminated in an accord between the two states (Da42 to Da47, Da53). The core of the accord was that New York would retain the full amount of New York income taxes imposed upon New Jersey residents, with New Jersey allowing a full credit for those payments, and that New Jersey would retain the full ETT taxes imposed upon New York residents, with New York allowing a full credit for those payments (Da47).

The terms of the accord between the states were announced by Governors Rockefeller and Hughes on May 6, 1962 in the following Executive Statement:

> "Governor Richard J. Hughes of New Jersey and Governor Nelson A. Rockefeller of New York announced today that they had reached an understanding in regard to the administration and enforcement of the personal income tax laws of their respective States as they affect residents of the other State.
>
> "Governor Rockefeller announced that New York, under legislation enacted at the 1962 legislative session, will allow its residents a credit against their New York State personal income taxes for income taxes paid to New Jersey under the New Jersey Emergency Transportation Act enacted in 1961, as amended.

"Governor Hughes announced that he would submit to the New Jersey Legislature on Monday legislation which will grant to New Jersey residents a credit against the New Jersey Emergency Transportation Tax for income taxes paid to the State of New York under New York's personal income tax law, as amended in 1962.

"In addition, it was agreed that neither State would contest nor participate in contesting the right of the other to levy and collect the taxes imposed by the two laws on residents of the other; and that each State would assist and cooperate with the other in the administration and enforcement thereof so as to assure to the citizens of each who are directly involved the greatest degree of certainty as to their responsibilities under the two laws.

"The Governors expressed the belief that this agreement will clarify for the New York and New Jersey commuters their status in regard to the income tax laws of the two States and will insure certainty in the application and administration of such laws.

"The Governors stated that they are taking this action in the interest of promoting interstate cooperation and pledged their continued cooperation in other matters affecting their citizens who live in one state and work in the other. Noting the progress that has been made recently in such matters as the Hudson and Manhattan Railroad, the World Trade Center, and the program for an integrated regional transportation network, the Governors expressed their confidence of still further progress through similar joint action, conducted in a spirit of harmony, cooperation and good will." (App. B at 44-45).

Following this executive action, the New Jersey Legislature enacted Chapter 70 of the Laws of 1962, which was made expressly retroactive to all taxable years beginning on or after January 1, 1961 (Da24). This provision affords a credit to New Jersey residents against the ETT for any income tax imposed by another "critical area State" (*i.e.*, New York). N.J.S.A. 54:8A-16(B). Thus, due to the retroactive amendment of the New York Personal Income Tax Law repealing the "nonresident" credit and the subsequent amendment of the ETT granting a credit to New Jersey residents for taxes paid to New York, the ETT is now paid by New York residents working in New Jersey rather than, as originally intended, New Jersey residents working in New York.

These arrangements between the two states have remained in effect for more than fifteen years. However, this action, seeking a declaration that the ETT is unconstitutional, was filed by three New York residents in June of 1977. After the appellee had filed two procedural motions, one of which was denied and the other of which was never ruled upon,* the matter was brought before the trial court on cross motions for summary judgment in December of 1977. At that time the appellants insisted upon the right to take the depositions of the persons whose affidavits had been submitted in support of the appellee's motion for summary judgment (Transcript of December 15, 1977 hearing, at T4-6 to T5-3). This resulted in the taking of more than 550 pages of depositions as well as the

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* The indication in the Jurisdictional Statement that the appellee has filed certain motions for purposes of delay is unwarranted and offensive. Each one of the motions referred to by appellants had a substantial basis in State law (see appellee's brief filed with the Supreme Court of New Jersey, at pp. 1-2, 38, 44-46) and was filed by the appellee because it was felt that his position on the merits would be furthered if the motion were granted.

introduction of hundreds of pages of exhibits in connection with those depositions (Pa50 to Pa100, Pa120 to Pa131). The matter was then brought back before the trial court, first in February and then in March 1978, at which time there was further controversy concerning the parameters of the record (Pa145 to Pa149, Da45 to Da59).

On October 24, 1978 the trial court issued a comprehensive opinion upholding the constitutionality of the ETT (App. B at 35-59). The trial court made a number of findings of fact which supported the constitutionality of the ETT, including findings that:

> "5. The determination by the administrative authorities in New Jersey of the existence of a 'transportation crisis' in addition to being presumptively accurate is justified by the facts and the Court finds that such a problem exists.
>
> "6. The purposes expressed in the statute for the utilization and allocation of the funds collected under the challenged tax . . . bear a direct relationship to the crisis referred to.
>
> "7. . . . [I]f the Act is administered in accordance with the express purposes, then in fact taxpayers, such as plaintiffs, will receive a direct benefit from the expenditure of the funds." (App. B at 52).

The court further found that ". . . the transportation problem is substantial and the ultimate impact of the tax upon residents and non-residents bears a close relation to the challenge of correcting the traffic and commuting problems." (App. B at 55). Based upon these factual findings, the trial judge concluded that the appellants had failed to demonstrate that the ETT violates the United States Constitution.

The trial court also found that New York and New Jersey had entered into a reciprocal agreement, consistent with the principles of interstate comity embodied in the Privileges and Immunities Clause of Article IV, pursuant to which the ETT and its companion legislation in New York had been enacted and remained in effect. In finding the existence of such a mutual undertaking between the states the trial court stated:

> "In the 1962 Act and thereafter, these two sovereign states by compact, by arrangement, by agreement, by attitude and by legislation set up an arrangement whereby they agreed on a taxing method which would govern commuters. New York accepted the 1961 legislation and what developed later. It arranged for certain credits to be given residents of both New York and New Jersey. New York saw to it that its residents did not pay anything extra by virtue of their working in New Jersey. New Jersey took the same attitude.
>
> • • •
>
> "... [T]here is no question in this Court's mind that the 1962 accord between the two states and the actions and inactions of the parties thereafter through 1975 represented a reciprocal understanding, compact or the like between the legislative and executive branches of these two states ..." (App. B at 56).

On direct appeal from the judgment of the trial court, the Supreme Court of New Jersey held in favor of the appellee on one issue, in favor of the appellants on two issues and it ordered a remand with respect to one critical element of the case. First, the court held that the case could be adjudicated without New York being joined as a party even though the complaint collaterally attacked a 1962 agreement between the States of New York and

New Jersey dealing with the allocation of the fiscal burdens of state government caused by interstate commuters (App. A at 4-8). Second, it held that this agreement was irrelevant to the question of the conformity of the ETT with the requirement of the Privileges and Immunities Clause of Article IV because the agreement was not entered into in conformity with the provisions of the Compact Clause (U.S. Const., Art. I, §10, cl. 3) (App. A at 27-31). Third, the court held that the ETT is consistent with the Equal Protection Clause of the Fourteenth Amendment (App. A at 31-35). Finally, the Supreme Court of New Jersey concluded that the trial court had acted improvidently in deciding the principal issue in the case on cross motions for summary judgment. It concluded that the question whether the ETT is properly designed to impose a fair share of the costs incurred by New Jersey in the operation of interstate transportation facilities upon nonresidents who directly benefit from those facilities is a factual question which should have been decided only after a plenary trial (App. A at 17-27). It therefore ordered a remand ". . . to permit a full exploration of the benefits and burdens to nonresidential commuters occasioned by State transportation programs and imposition of the ETT." (App. A at 26). In providing guidelines for further trial proceedings the Supreme Court of New Jersey said:

> "On remand, evidence should be introduced to enable the trial court to compare the transportation benefits New York residents receive and the tax contributions they are required to make. The data must therefore include statistics on annual state and local expenditures—identified by source—for commuter rail and bus services and for construction and maintenance of highways used by interstate

> commuters. Figures on the amount and application of ETT monies must also be presented. Commutation figures must be introduced for the years during which non-residents paid emergency transportation taxes." (App. A at 26-27).

The case is therefore now back before the trial court for the plenary trial on remand ordered by the Supreme Court of New Jersey.

ARGUMENT

POINT I

The appeal should be dismissed for lack of jurisdiction because an order remanding a case for plenary trial on the same federal issue which is the subject of the appeal is not a final judgment from which a party may appeal pursuant to 28 U.S.C. §1257.

As discussed in greater detail in the cross petition for a writ of certiorari, it was the position of the appellee before the Supreme Court of New Jersey and continues to be his position that the factual record initially developed before the trial court is sufficient to sustain the constitutionality of the ETT. However, acknowledgement must be given to the fact that the Supreme Court of New Jersey disagreed with this position and concluded that that record was insufficient to determine whether the ETT imposes on nonresidents only "their share of the transportation problem they cause or the benefits they receive." (App. A at 36). The court therefore concluded that a remand for the development of a full record was required before it could decide whether the ETT was compatible with the Privileges and Immunities Clause of

Article IV of the United States Constitution. This disposition requires acknowledgement that the remand order of the Supreme Court of New Jersey is not a "final judgment" subject to review by the Court pursuant to 28 U.S.C. §1257.

Review pursuant to 28 U.S.C. §1257 is only available with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ." The Court has said that to satisfy this "finality" requirement, an order of a state court

> "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street Railway Company* v. *Railroad Com'n of State of California,* 324 U.S. 548, 551 (1945).

There have been limited circumstances in which the Court has found the finality requirement to be satisfied even though parts of a case remain open for further proceedings in the state courts. See generally, *Cox Broadcasting Corporation* v. *Cohn,* 420 U.S. 469, 476-487 (1975). However, the firmly established threshold requirement for finding the existence of a final judgment for the purposes of 28 U.S.C. §1257 is that "the highest court of a State has finally determined the federal issue present in a particular case. . . ." *Id.* at 477. See also *Gospel Army* v. *Los Angeles,* 331 U.S. 543 (1947). Wright, Miller, Cooper & Gressman, *Federal Practice* and *Procedure Jurisdiction,* §4010, pp. 585-586 (1977).

The remand order of the Supreme Court of New Jersey clearly fails to satisfy this threshold requirement for a finding of finality. The principal issue in the case

is the conformity of the ETT with the requirements of the Privileges and Immunities Clause of Article IV of the United States Constitution. On this issue the Supreme Court of New Jersey has not yet reached a final determination. Rather it has simply said that the existing record is inadequate to reach a proper determination and it has remanded the case for a plenary trial. This means that if the court were to consider the constitutionality of the ETT at the present posture of the case it would not be reviewing a final determination of the State's highest court.* Therefore, the remand order

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*It is true that the Supreme Court of New Jersey has finally decided that the ETT does not violate the Equal Protection Clause of the Fourteenth Amendment. However, the Court has repeatedly declined to find the finality requirement satisfied when there has been an interlocutory decision as to one federal issue but a second federal issue remains open for decision at a later stage of the proceedings. As noted in *Cox Broadcasting Corporation* v. *Cohn, supra*:

> "Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal question with another federal question to be decided later. 'For in those cases the federal constitutional question embraces not only a taking but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem.' *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973)." 420 U.S. at 477, n. 6.

Similarly, the question whether a tax alleged to unfairly burden a non-resident violates the Equal Protection Clause is so closely related to the question whether it violates the Privileges and Immunities Clause of Article IV (see *Shaffer* v. *Carter*, 252 U.S. 37, 55-57 (1920); *Baldwin* v. *Montana Fish and Game Com'n*, 436 U.S. 371, 406, n.6 (1978) (Brennan, dissenting)) that the lack of finality of a disposition of the later issue also necessarily bars review of the former issue.

of the Supreme Court of New Jersey fails to satisfy the threshold requirement for a finding of finality.

Furthermore, even if this threshold defect could be overcome, review of the Supreme Court of New Jersey's remand order would be inconsistent with the policies intended to be served by the finality rule. Since the principal issue on which the appellants seek to appeal is precisely the same issue as the Supreme Court of New Jersey has remanded to the trial court, the practical effect of the appeal, assuming either that the State trial court is divested of jurisdiction (see *Hovey* v. *McDonald,* 109 U.S. 150, 157 (1883); 9 Moore's *Federal Practice,* ¶203.11, n. 1 (1980)) or that it chooses as a matter of sound judicial administration not to proceed with the remand pending action by this Court, would be to delay the proceedings on remand. The avoidance of such interruption of state trial court proceedings is one of the primary objectives of the finality rule. *Catlin* v. *United States,* 324 U.S. 229, 233-34 (1945); see also Note "The Finality Rule For Supreme Court Review of State Court Orders", 91 Harv. L. Rev. 1004, 1006 (1978). Another possible consequence of now entertaining an appeal from the Supreme Court of New Jersey's remand order is that the Court would affirm that disposition and then be called upon to review the case again after proceedings had been completed before the trial court and a final decision had been made by the Supreme Court of New Jersey. The possible need for such multiple appeals would be inconsistent with a further purpose of the finality rule, the avoidance of piecemeal appellate review. *United States* v. *MacDonald,* 435 U.S. 850, 853 (1978); *DiBella* v. *United States,* 369 U.S. 121 (1962).

There also is a serious procedural issue which would be raised by an appeal from the Supreme Court of New

Jersey's remand order, at least if the Court considered the constitutionality of the ETT as distinguished from simply the propriety of the remand. As recognized both by the trial court and the Supreme Court of New Jersey, the issues in this case are essentially factual in nature. With respect to these issues the trial court made a number of critical findings of fact. For example, it found that ". . . the transportation problem [for commuters between New York and New Jersey] is substantial and the ultimate impact of the tax upon residents and nonresidents bears a close relation to the challenge of correcting the traffic and commuting problems." (App. B at 55). The essential position of the appellee in the appeal to the Supreme Court of New Jersey was that this and other similar findings were supported by sufficient credible evidence in the record and that such findings provide an adequate basis for upholding the constitutionality of the ETT. The Supreme Court of New Jersey did not set aside any specific findings of the trial court nor did it make any findings of its own but rather it stated broadly that ". . . a ruling on the constitutionality of the ETT cannot be made on the present record." (App. A at 35). Therefore, if probable jurisdiction were noted one initial question would be whether any weight should be accorded to the factual findings of the trial court. Furthermore, if the Supreme Court of New Jersey's remand order were read as requiring those findings to be ignored, the Court would have to address the further question whether it should make its own findings of fact based upon a record found to be inadequate by the Supreme Court of New Jersey. These uncertainties concerning the status of the present record are a further reason why interlocutory review would not be appropriate even if the Supreme Court of New Jersey's remand order satisfied the threshold re-

quirement of being a final determination of the federal issue on which review is sought.*

In short, this case is no different from numerous other cases brought each year in the state courts challenging the constitutionality of state legislation or administrative actions.** It is not at all uncommon for the attacking party to file a motion for judgment on the pleadings or for summary judgment which, if well grounded, would

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* The uncertainty concerning the status of the record developed before the trial court and the findings made thereon by the trial court is also the reason that the appellee feels review of the case in its present procedural posture would be prejudicial. That record and those findings were critical to the appellee's defense of the ETT before the Supreme Court of New Jersey. The further record and findings now directed to be made by the Supreme Court's order of remand will be equally critical in any subsequent proceedings which might be taken either to the Supreme Court of New Jersey or to this Court. In other words, the record and clear-cut findings based on that record are too important to a proper decision for this case to be reviewed in its present procedural posture.

** The appellants in effect argue that the requirements of 28 U.S.C. §1257 should be ignored because the time required to complete the remand ordered by the Supreme Court of New Jersey will cause irreparable harm. However, even if such harm could be shown it would not justify disregarding the minimal finality requirement of §1257 that the federal question presented for review actually has been decided by the State's highest court. In any event, the claims of harm postulated in the Jurisdictional Statement are fabricated. The three appellants (this is not a class action) are New York residents who receive credit from New York for the full amount of ETT taxes paid to New Jersey. As a result, the appellants suffer no tangible harm from the ETT. Therefore, it is sheer fancy to suggest that appellants' freedom to travel or to practice their occupations is in any way inhibited by the ETT. In short, there is no special consideration raised by this case warranting consideration of a departure from compliance with clear-cut finality requirements.

bring the case to a speedy conclusion. It is also not at all uncommon for such motions to be denied or, if granted, to be reversed by a state appellate court, with the consequent necessity for a plenary trial. Any party who has sought summary disposition of a constitutional claim—and believes it should have been so treated—may argue that that claim "involves important federal rights which require immediate vindication . . ." and that "[r]eversal of the state court on the federal issue would preclude any further litigation. . . ." (Jurisdictional Statement, p. 15). However, 28 U.S.C. §1257, no matter how broadly construed, represents a firm congressional mandate that such an open-ended avenue for review of interlocutory rulings of state courts should not be available. Respect for that mandate requires that this appeal be dismissed for lack of jurisdiction.

POINT II

No substantial federal question is presented by a decision of the Supreme Court of New Jersey which remands a constitutional challenge to a state taxing statute for a plenary trial.

At the outset, it is important to re-emphasize that the decision of the Supreme Court of New Jersey which appellants seek to appeal is an order remanding the case for a plenary trial. Therefore, the question is not whether the conformity of the ETT with the Privileges and Immunities Clause of Article IV would present a substantial constitutional question but rather whether the decision of the Supreme Court of New Jersey that a plenary trial should be held presents a substantial constitutional question.

Although the appellee takes the position that the factual record initially developed before the trial court is sufficient to sustain the constitutionality of the ETT, it cannot reasonably be argued that the remand ordered by the Supreme Court of New Jersey is frivolous or capricious. On the contrary, it must be acknowledged that the Court has frequently stressed the importance of development of a full record in litigation in which it is claimed that taxes impose an undue burden upon nonresident parties. See, *e.g., Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429, 477 n.25. Indeed, in *Austin* v. *New Hampshire,* 420 U.S. 656 (1975), the very case upon which the appellants primarily rely in their attack upon the constitutionality of the ETT, the Court pointedly noted:

> ". . . [W]e find no support in the record for the assertion of the court below that the Commuters Income Tax creates no more than a 'practical equality' between residents and nonresidents when the taxes paid only by residents are taken into account. '[S]omething more is required than bald assertion' by the state court or by counsel here—to establish the validity of a taxing statute that on its face discriminates against nonresidents. *Mullaney* v. *Anderson,* 342 U.S. 415, 418 (1952)." 420 U.S. at 665 n.10.

In the face of this description of the state court proceeding in the case primarily relied upon by the appellants, it is easy to understand the sensitivity of the Supreme Court of New Jersey to the adequacy of the record on which it was asked to determine the constitutionality of the ETT.

It is true that there already is an extensive record in this case. However, that record consists primarily of depositions and exhibits presented to the trial court in a

summary proceeding. Furthermore, the appellants have not accepted the factual materials submitted by the appellee but rather have raised questions concerning the accuracy of certain statements made by the State's witness (Brief for Plaintiffs submitted to the Supreme Court of New Jersey, 29-30). The Supreme Court of New Jersey therefore may have concluded that a plenary trial was required to resolve such disputes. The court also apparently felt that there were relevant areas of factual inquiry which were not adequately covered by the existing record. Therefore, there was a reasonable basis for the Supreme Court of New Jersey's decision that the constitutionality of the ETT could be best judged on the basis of a record developed at a plenary trial, and its remand order requiring such a trial presents no substantial federal question warranting review by the Court.

The Supreme Court of New Jersey's rejection of appellants' arguments grounded on the Equal Protection Clause also fails to present any substantial constitutional question. Initially, it should be noted that claims by nonresidents of unfair or discriminatory taxation generally have been grounded upon the Privileges and Immunities Clause of Article IV rather than the Equal Protection Clause. *Austin* v. *New Hampshire, supra; Shaffer* v. *Carter,* 252 U.S. 37, 55-57 (1920); *Travellers' Insurance Company* v. *Connecticut,* 185 U.S. 364 (1902). Furthermore, there is no support for any assertion that the Equal Protection Clause affords any broader protection with respect to discrimination on the basis of nonresidency than does the Privileges and Immunities Clause; on the contrary, the prevailing assumption is that the protection it affords is narrower. *Cf. Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1959). Therefore, even accepting appellants' view of the finality rule, it is clear that the arguments now advanced under the banner of the Equal Protection Clause

will be fully preserved for later presentation on the basis of the Privileges and Immunities Clause.

In any event, the appellants' equal protection argument is lacking in substance. The Court has recognized that the State may classify the subjects of taxation for differing treatment upon any basis which bears a rational relation to a legitimate end of government. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Allied Stores of Ohio, Inc.* v. *Bowers, supra.* Furthermore, this broad power of the Legislature to structure a state's tax system is not constricted simply because the attacking party happens to be a nonresident. *General American Tank Car Corp.* v. *Day*, 270 U.S. 367 (1926); *Shaffer* v. *Carter, supra; Travellers' Insurance Company* v. *Connecticut, supra; cf. Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Therefore, the appellants' challenge to the ETT under the Equal Protection Clause must be rejected if there is any rational basis for the imposition of the tax.

There can be no serious doubt but that such a rational basis exists for the imposition of the ETT. As observed by the Supreme Court of New Jersey:

> "New York residents who commute to New Jersey contribute significantly to the excessive demands placed on New Jersey's transportation facilities in the New York-New Jersey area. It is certainly conceivable that New Jersey residents are called upon to pay their fair share of transportation costs by the operation of other state and local taxes. Mathematical equality of impact is not required." (App. A at 34).

Finally, it should be reiterated that even if appellants were correct in their assertion that a greater showing is required to establish a "rational basis" for the imposition

of the ETT, the remand ordered by the Supreme Court of New Jersey will provide a more than adequate opportunity for further development of the record. Therefore, any review of the validity of the ETT, whether grounded on the Privileges and Immunities Clause or the Equal Protection Clause, should be postponed until that remand is completed.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for lack of jurisdiction because the remand order of the Supreme Court of New Jersey is not a final judgment within the meaning of 28 U.S.C. §1257. In the alternative, the appeal should be dismissed for failure to present a substantial federal question.

Respectfully submitted,

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No. 79-2026

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SALORIO, ROBERT COE and
JOHN D. McGARR, JR.,

Appellants,

v.

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Appellee.

On Appeal from the Supreme Court of New Jersey

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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TABLE OF CONTENTS

PAGE

Appellants' Brief In Opposition To Motion To Dismiss:

I 1

II 3

III 6

CONCLUSION 7

PAGE

TABLE OF AUTHORITIES

Cases Cited

Austin v. *New Hampshire*, 420 U.S. 656 (1975) 1-3, 6, 7

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 5

Other Authority Cited

Note, The Finality Rule for Supreme Court Review of State Court Orders, 91 Harv. L. Rev. 1004 (1978) 6

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

I

Review of this case by this Court is proper at this time. The State of New Jersey agrees: it affirmatively asserts in its motion that the record is complete, that discovery has been had, that further proceedings are unnecessary to decide the case, and that a speedy disposition is warranted.

Most important, New Jersey does not dispute *any* of the basic factual assertions on which rests appellants' claim that the New Jersey Commuter Tax is indistinguishable from the tax struck down in *Austin* v. *New Hampshire,* 420 U.S. 656 (1975). Thus, New Jersey does not dispute that:

—The Commuter Income Tax has been applied and will be applied only to New Yorkers.

—The Commuter Income Tax was not designed to impose a tax on New Yorkers at all.

—The vast majority of interstate commuters are New Jersey citizens, not New Yorkers.

—The proceeds from the tax paid by New Yorkers are used principally to finance intrastate transportation facilities used mainly by New Jersey residents.

—The rate, and other aspects, of the Commuter Income Tax have not been adjusted—even once—during the entire twenty year history of the tax to meet any changing transportation needs or burdens, but solely to conform to the New York State Income Tax.

In short, on the *undisputed* facts, the Commuter Income Tax, like the discriminatory tax struck down in *Austin,*

"falls exclusively on the income of nonresidents and is not offset, even approximately, by other taxes imposed upon residents alone." *Austin* v. *New Hampshire,* 420 U.S. at 665.

New Jersey tries to distinguish the tax here from the tax in *Austin* by urging—as it urged below—that New Yorkers commuting to New Jersey place a burden on New Jersey transportation services, a burden that allegedly justifies the special tax on New Yorkers only. But this distinction is simply untenable on the undisputed facts listed above. New Jersey's attempted justification for its tax on New Yorkers defies even common sense: since New Yorkers constitute a minority of interstate commuters, they are traveling against the flow of rush hour traffic—a flow created by New Jersey citizens—and therefore New Yorkers cannot impose a significant commutation burden. More important, New Jersey's profferred distinction is irrelevant, since the burden imposed by New Yorkers here is no different from the burden imposed by the residents of Maine who necessarily "transported" themselves to New Hampshire.*

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* Although all the key facts on which we rely are undisputed, in the few instances where New Jersey purports to engage in a discussion of facts, it does so without a single record reference—with good reason: its "facts" are both wrong and irrelevant. Thus:

New Jersey describes itself as a "corridor state" with only a limited number of available "river crossings" (Appellee's Brief, at 2). According to the State, the restricted number of river crossings cause interstate transportation problems which justify the Commuter Income Tax. These river crossings, however, are under the jurisdiction of—*and paid for by*— the New York Port Authority, not the State of New Jersey. (Deposition of Russel H. Mullen dated January 17, 1978, at 15-18).

(Footnote continued on following page)

II

New Jersey says that review may not be had, despite the readiness of both parties to stand on the record, because the Supreme Court of New Jersey ordered further proceedings. New Jersey's effort to hide behind the remand order, by characterizing the "Question Presented" in this case as whether "a remand order presents a substantial federal question," only highlights the need for review by this Court, and at this time. The remand order disregards this Court's decree in *Austin* by forcing appellants, who have already spent years in the state court system, to litigate again the same legal question answered by this Court after much turmoil just a few years ago.

(Footnote continued from preceding page)

New Jersey says next that its tax structure relies heavily on real property taxes "ordinarily paid only by residents," and therefore New Jersey must place a commutation tax on New Yorkers (Appellee's Brief, at 2). New Jersey itself concedes, however, that its real property taxes are levied against residents and nonresidents alike, and there is no support in the record for the notion that New Yorkers pay an insignificant share of New Jersey property taxes. To the contrary, appellee admitted during discovery that he had no idea what proportion of New Jersey property taxes are paid by New Yorkers owning property located in New Jersey (Deposition of Sidney Glaser dated January 12, 1978, at 137-38). This Court expressly held in *Austin* that taxes imposed on both residents and nonresidents alike are irrelevant to the inquiry here. 420 U.S. at 659 n.3.

New Jersey says finally that the tax was the subject of an "executive accord" between the Governors of New York and New Jersey which accepted the tax as legal (Appellee's Brief, at 5-7). The legal irrelevance and factual baselessness of this alleged "accord" is addressed by appellants in their response to the cross petition for certiorari filed by appellee.

Moreover, the limited remand ordered by the New Jersey Supreme Court to determine "the benefits and burdens to nonresidential commuters occasioned by State transportation programs and imposition of the ETT" (App. A, at 26) is, in light of New Jersey's own concessions in its Motion to Dismiss, meaningless.*

Since New Jersey does not dispute that New Jerseyites commuting to New York far outnumber New Yorkers commuting to New Jersey, a remand to determine whether New Yorkers constitute the "peculiar source" of New Jersey's alleged transportation difficulty is a waste of time. And since New Jersey concedes that the tax never even purported to be based on any analysis of any transportation burden created by New Yorkers, and, indeed, as originally enacted, did not fall on New Yorkers at all, a remand to determine whether the discrimination practiced against New Yorkers bears a "substantial relationship" to the burdens allegedly imposed by New Yorkers on transportation, is meaningless.

New Jersey argues that a remand order which it agrees is unnecessary and which accomplishes only delay in vindication of constitutional rights is, nonetheless, a bar to this Court's review. This is wrong as a matter of law. As we noted in our main brief, this Court repeatedly has given substantive content to the term "final judgment"; it has not refused to review a case merely because the judgment appears in form only to be "inter-

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* New Jersey asserts that the remand by the New Jersey Supreme Court was for a "plenary" trial (Appellee's Brief, at 10-11). It was not. The remand is limited to two issues only—whether New Yorkers constitute the "peculiar source" of New Jersey's transportion burden and, if so, whether the tax bears a substantial relation to that burden.

locutory." Thus in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), this Court said review is proper, despite an outstanding remand order, where—as here—the state court erroneously refuses to strike down a statute, and therefore the trial should not take place at all. 420 U.S. at 485. Similarly, this Court said in *Cox* that a judgment is "final" if the dispositive federal issue will survive and require decision by this Court regardless of the outcome of future state court proceedings. 420 U.S. at 480. Since appellants will return to this Court with precisely the same claim presented here if they do not prevail on remand, and it is obvious from New Jersey's brief that it, too, will seek review in this Court on the precise ground presented in its motion to dismiss and its cross petition for certiorari if it does not prevail on remand, nothing "short of settlement of the case" will make unnecessary a decision by this Court.

New Jersey's assertion that the policies of the finality rule will be impeded if review is granted because it would delay the proceedings on remand (Brief for Appellee, at 14) can be answered by a single sentence from New Jersey's own brief:

> "[I]t was the position of the appellee before the Supreme Court of New Jersey and continues to be his position that the factual record initially developed before the trial court is sufficient to sustain the constitutionality of the ETT." (Brief for Appellee, at 11.)

A resolution by this Court whether the tax is constitutional or not—as both parties agree may be done on the present record—will not delay state court proceedings, it will obviate them. Chief among the policies of the finality rule is the avoidance of "the mischiefs of

economic waste" and of "delayed justice." Note, *The Finality Rule for Supreme Court Review of State Court Orders,* 91 Harv. L. Rev. 1004, 1006 (1978). Those policies can be served only if review is granted now.

III

New Jersey's assertion that the decision below upholding the tax under the Equal Protection Clause does not warrant review because claims by nonresidents of discriminatory taxation generally have been grounded upon the Privileges and Immunities Clause (Brief for Appellee, at 19) is mystifying. The statement is untrue since, for example, plaintiffs in *Austin* grounded their claim also on the Equal Protection Clause. Even if it were true, the novelty of a constitutional challenge would be a reason for granting, not denying, review.

New Jersey also contends that the decision below does not warrant review because it is correct. Perhaps the best proof that there is no rational basis for the imposition of the tax lies in this fact: Under the Commuter Income Tax system, citizens of other states commuting to New Jersey and New Jersey citizens who constitute the bulk of interstate commuters are not taxed, while New Yorkers who derive income from New Jersey but do not set foot in New Jersey are taxed.

CONCLUSION

The decision appealed from should be reversed with instructions to declare the New Jersey Commuter Income Tax unconstitutional in light of *Austin* v. *New Hampshire*.

Respectfully submitted,

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August 20, 1980